TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED

OCTOBER TERM,

No.

[redacted] JONES, TRUSTEE IN BANKRUPTCY OF [redacted] DREDGING COMPANY, APPELLANT,

vs.

CHARLES SPRINGER.

APPEAL FROM THE SUPREME COURT OF THE [redacted]
NEW MEXICO.

FILED MARCH [redacted], 1902.

(22,060.)

(22,080.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 485.

FRANK H. JONES, TRUSTEE IN BANKRUPTCY OF THE ORO DREDGING COMPANY, APPELLANT,

vs.

CHARLES SPRINGER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 22, 1911.

1 Be it remembered that heretofore, on to wit, *on* the 5th day of May, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a transcript of record, in a certain cause entitled, Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant vs. Charles Springer, Appellee, numbered in the Docket of the said Supreme Court No. 1232, which said transcript of record in the said above entitled cause, was and is in words and figures following to wit.

2 TRANSCRIPT OF RECORD.

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant,

vs.

CHARLES SPRINGER, Appellee.

Appeal from District Court, Fourth Judicial District, County of Colfax.

Elmer E. Studley, Raton, New Mexico; Scott, Bancroft & Stephens, Chicago, Illinois, Attorneys for Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant.

Charles A. Spiess, East Las Vegas, N. M., Attorney for Appellee.

3 *Index.*

TERRITORY OF NEW MEXICO,
Fourth Judicial District, County of Colfax:

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant; FRANK H. JONES, Trustees in Bankruptcy, Intervenor.

Attachment.

Be it remembered, That heretofore to-wit, on the 23rd day of February, 1906, J. van Houten, plaintiff, by his attorney, filed in the office of the Clerk of the District Court of the Fourth Judicial District, sitting within and for the County of Colfax, his complaint and affidavit, which said complaint and affidavit is in words and figures as follows, to-wit:

Complaint.

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court.

J. VAN HOUTEN, Plaintiff.
vs.
ORO DREDGING COMPANY, Defendant.

Plaintiff for cause of action states:

1. That plaintiff is a resident of the County of Colfax in the Territory of New Mexico, and the defendant, The Oro Dredging Company, is a corporation organized under the laws of the State of Illinois.

7 2. That on the 11th day of September, 1905, the defendant, The Oro Dredging Company, made, executed and delivered to the First National Bank of Raton, New Mexico, its promissory note for the sum of five thousand ($5,000) dollars, payable in ninety days after said date, and bearing interest at the rate of eight per cent. per annum from the maturity thereof until paid, and with the per cent. attorney's fees upon the amount due in case suit should be brought to enforce the collection of said note, which said note is in words and figures as follows, to-wit:

"$5000.00. SEPT. 11, 1905, RATON, NEW MEXICO.

Ninety days after date, without grace, we jointly and severally promise to pay to the order of the First National Bank of Raton, Five Thousand dollars, at the office of said Bank, in Raton, New Mexico, with interest at the rate of 8 per cent. per annum from maturity until paid. Value Received. And in the event of a suit to enforce the collection of this note we further agree to pay the additional sum of 10 per cent. upon the amount found due as attorneys' fees in said suit, or if attorneys are employed to collect the same.

(Signed) ORO DREDGING COMPANY,
By J. VAN HOUTEN.
(Signed) J. VAN HOUTEN."

No. 7755. Due Dec. 10, 1905.

3. That no part of said note, nor the interest or attorneys' fees as therein provided has ever been paid.

4. That prior to the commencement of this suit, and for a valuable consideration, the said First National Bank of Raton, New Mexico, sold, assigned, transferred and set over the promissory note aforesaid, to plaintiff herein.

5. That on the 20th day of February, 1905, Charles A. Spiess, and Stephen B. Davis, Jr., were employed as attorneys to collect the said note.

8 And for another and further cause of action against the defendant, plaintiff states.

1. That plaintiff is a resident of the County of Colfax, in the Territory of New Mexico, and the defendant, the Oro Dredging Company, is a corporation organized under the laws of the State of Illinois.

2. That on the 10th day of February, 1906, the defendant made and delivered to plaintiff its promissory note for the sum of fifteen hundred and ninety-two and 94/100 ($1,592.94) dollars, payable one day after said date, with interest at the rate of eight per cent. per annum from the maturity thereof until paid, and with ten per cent. attorneys' fees on the amount found due in case attorneys should be employed to collect said note, which said note is in words and figures as follows, to-wit:

"$1592.94. FEB. 10, 1906, RATON, NEW MEXICO.

One day after date, without grace, we jointly and severally promise to pay to the order of The First National Bank of Raton, Fifteen hundred and ninety-two and 94/100 dollars, at the office of said Bank in Raton, New Mexico, with interest at the rate of 8 per cent. per annum from maturity until paid. Value Received. Interest payable semi-annually. And in the event of a suit to enforce the collection of this note we further agree to pay the additional sum of 10 per cent. upon the amount found due, as attorneys' fees in said suit, or if attorneys are employed to collect the same.

(Signed) ORO DREDGING COMPANY.
By J. VAN HOUTEN.
(Signed) J. VAN HOUTEN.

No. 8078. Due—Demand.

3. That the defendant has failed and refused, and still fails and refuses to pay any part of the principal of said note, or of the interest or attorneys' fees as therein provided, although often requested so to do.

9 4. That prior to the commencement of this suit, and for a valuable consideration, the said First National Bank of Raton, New Mexico, sold, assigned, transferred and set over the promissory note aforesaid to plaintiff herein.

5. That on the 20th day of February, 1906, Charles A. Spiess and Stephen B. Davis, Jr., were employed as attorneys to enforce the collection of said note.

Wherefore plaintiff asks judgment against the defendant in the sum of seven thousand five hundred dollars, together with the costs of this action.

CHARLES A. SPIESS AND
S. D. DAVIS, JR.,
Las Vegas, New Mexico,
Attorneys for Plaintiff.

Affidavit.

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court.

No. —.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

Charles A. Spiess, being first duly sworn deposes and says: that he is one of the attorneys for the plaintiff in the above entitled cause, J. van Houten, and makes this affidavit for and on behalf of said plaintiff, for the reason that said plaintiff is not within the County of San Miguel, in the Territory of New Mexico, wherein affiant resides. That the defendant in said cause, the Oro Dredging Company, is justly and truly indebted to plaintiff after allowing all just credits and offsets, in the sum of seven thousand three hundred and for'-five and 09/100 ($7,345.09) dollars, for and on account of two certain promissory notes made by the defendant to the First National Bank of Raton, New Mexico, and assigned to plaintiff, which said promissory notes are set out in the complaint of plaintiff, and for and on account of the interest and attorneys' fees as in said note provided.

And affiant further states that he has good reason to believe, and does believe, that the defendant, the Oro Dredging Company, is not a resident of and does not reside in the Territory of New Mexico; that the said Oro Dredging Company has no designated agent in the Territory of New Mexico, upon whom service of process may be made in suits against said corporation; that the said defendant is about to remove its property and effects out of the territory of New Mexico, and has fraudulently concealed and disposed of its property and effects so as to defraud, hinder and delay its creditors, and that the said defendant is about fraudulently to convey and assign, conceal and dispose of its property and effects so as to hinder, delay and defraud its creditors, and that the said defendant is a corporation organized under the laws of the State of Illinois, and having its principal office and place of business out of the Territory of New Mexico, and that such corporation has no designated agent in the Territory of New Mexico upon whom service of process may be made in suits against it.

CHARLES A. SPIESS.

Subscribed and sworn to before me this 21st day of February, 1906.

[SEAL.]

LOUIS C. ILFIELD,
Notary Public.

11 (Endorsed:) No. 2702. In the District Court of the County of Colfax. J. Van Houten, plaintiff, vs. Oro Dredging Company, defendant, complaint and affidavit. Filed in my office Feb. 23, 1906, Secundino Romero, Clerk. Charles A. Spiess and Stephen D. Davis, Jr., Las Vegas, New Mexico. Attorneys for plaintiff.

And afterwards, to-wit, on February 23rd, 1906, there was filed in said clerk's office a bond, in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court.

J. VAN HOUTEN, Plaintiff.
vs.
ORO DREDGING COMPANY, Defendant.

Know all men by these presents, That we, the undersigned, J. van Houten as principal, and D. T. Hoskins and Frank Springer as sureties, are held and firmly bound unto the Territory of New Mexico, in the just and full sum of fifteen thousand ($15,000.00) dollars, lawful money of the United States of America, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents:

Sealed with our Seals and dated this 23rd day of February, A. D. 1906.

The condition of the foregoing obligation is such, that whereas, the above named principal has commenced suit and is about
12 to sue out a writ of attachment against the goods and chattels, land and tnements of the Oro Dredging Company, said cause being Number 2702, on the docket of the District Court of Colfax County, in the Territory of New Mexico.

Now, therefore, if the said above bounden principal shall prosecute his action without delay and with effect and shall refund all sums of money that may be adjudged to be refunded to the said defendant, the Oro Dredging Company, and shall pay all damages that may accrue to any defendant or garnishee by reason of said attachment or any process of judgment thereon, then and in that event this obligation shall be null and void, otherwise to be and remain in full force and effect.

J. VAN HOUTEN, [SEAL.]
By CHAS. A. SPIESS, *His Agent.*
$5,000. D. T. HOSKINS. [SEAL.]
10,000. FRANK SPRINGER. [SEAL.]

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

On this 23rd day of February, A. D. 1906, before me, the undersigned, a notary public, in and for the above county and terri-

tory, personally appeared Charles A. Spiess, to me known to be the person who executed the foregoing instrument in behalf of J. van Houten, and acknowledged that he executed the same as the free act and deed of said J. van Houten, and personally appeared D. T. Hoskins, and Frank Springer, sureties in the foregoing bond, and each for himself acknowledged that he signed, sealed and executed the same as his free act and deed; and said named sureties
13 each being first duly sworn each for himself deposes and says: that he is worth in money and property situated in the Territory of New Mexico and subject to execution therein, over and above all his just debts and liabilities, the sum set opposite his name in said bond.

Witness my hand and notarial seal the day and year in this certificate above written.

[SEAL.] FRANK B. JANUSRY,
Notary Public.

The foregoing bond is hereby approved.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

(Endorsed:) No. 2702. In the District Court, County of Colfax. J. van Houten, plaintiff, vs. Oro Dredging Company, defendant. Bond. Filed in my office Feb. 23rd, 1906. Secundino Romero, Clerk. Chas. A. Spiess and S. B. Davis, Jr., Las Vegas, New Mexico. Attorneys for plaintiff.

And afterwards to-wit: on February 23rd, 1906, there was issued out of said clerk's office a writ of attachment in words and figures as follows, to-wit:

The Territory of New Mexico to the Sheriff of Colfax County, Greeting:

You are hereby commanded to attach the goods and chattels, lands and tenements, effects and credits, in whos-oever hands they may be found, of Oro Dredging Company, or so much thereof, if to be found in your county, as will be sufficient to satisfy the sum of seven thousand three hundred and forty-five and 09/100 dollars, damages and costs of suit, and the same safely keep, or so provide that you have the same before the District Court for the Fourth Judicial District of said territory within and for the County of Colfax, within twenty days after service of this writ if defendant is served in any
14 county in this judicial district, otherwise, in thirty days after service; and that you also summon the said Oro Dredging Company if to be found in your county, to be and appear before the said District Court, within twenty days after service of this writ, of defendant is served in any county in this judicial district, otherwise in thirty days after service, to answer unto J. van Houten in a suit for damages for six thousand five hundred dollars, together with interest and costs of suit. And have you then and there this writ.

Witness, the Hon. William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth

Judicial District Court thereof and the seal of said District Court this 23rd day of February, 1906.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

(Endorsed:) This is an action of assumpsit begun by attachment brought to recover the amounts due from defendant to plaintiff upon two certain promissory notes made by defendant, for $5,000 and $1,592.94 dated Sept. 11, 1905, Feb. 10, '06, payable 90 days after date, and 1 day after date to plaintiff or order, with interest at 8 per cent. per annum from maturity, and for goods bargained and sold; for goods sold and delivered; for work done and materials for same provided; for money lent; for money paid; for money received; for interest and upon an account stated. Damages claimed $7,345.09, together with interest and costs. Secundino Romero, clerk.

(Endorsed:) No. 2702. District Court, Fourth Judicial District. County of Colfax, Territory of New Mexico. J. van Houten, plaintiff, vs. Oro Dredging Company, writ of attachment and summons. Charles A. Spiess and S. D. Davis, Jr., att'ys for plaintiff. Las Vegas, N. M. Served on A. J. Raught Feb. 27th, 1906, at Elizabethtown, N. M. A. J. Raught being Watchman. Thomas Cammard, Deputy sheriff. Fees, $3.25.

Description of Real and Personal Property Attached to Writ.

"Beginning at the N. E. cor. No. 1 at the S. E. corner of the tract of land heretofore sold by the Maxwell Land Grant Co. to Herman Mutz, in Sec. 20, Tp. 28 N. R. 16 E. of the New Mexico meridian. Set a pine post 6 in. by 6 in. by 4 ft. 2 ft. in ground and marked '1/275,' whence the corner to section 30, 31, 25, and 36, tp. 28 N. R. 15 and 16, E. bears S. 65 degrees 32', west 2241 ft. dist. the S. E. cor. of block 6, Elizabethtown, bears south 22 deg. 00' 13 seconds West 2930 and 32 100 ft. distant and the 'point of rocks' above Elizabethtown bears south 18 deg. 53 min. west 2344 ft. distant.

Thence S. 7 degrees 35' 41 seconds W. 3. 874.00 feet intersect line 4-1 of survey 252 Confidence Mill site at 192 ft. E. of corner 4/252.

4,380.00 feet intersect line 2-3 of survey 252 at 121 ft. E. of corner 3/252;

4,534.00 feet to cor. No. 2, identical with cor. No. 4 of survey 220 Klondyke marked '2 275' also marked '4/220' and M. X. 1/220' whence the S. E. corner of Elizabethtown bears N. 58 deg. 15 min. 20 sec. W. 536.12 feet dist.; thence S. 5 degrees 43 minutes E.;

627.000 feet to cor. No. 3 a pine post 6"x6"x4' set two ft. in ground and marked '3/275'; thence S. 49 deg. 33 min. East;

3,140.00 feet to corner No. 4 a pine post 6"x6"x4' set two feet in ground and marked '4/275'; thence South 23 deg. 25 min. E.

2,650.00 feet to cor. No. 5, a pine post 6"x6"x4' set two ft. in ground and marked '5/275'; thence South 13 deg. 55 min. East:

3,300.00 feet to cor. No. 6 a pine post 6″x6″x4′ set two
16 ft. in ground and marked '6/275'; thence S. 5 deg. 55
min. E.;

1,180.00 feet to the S. E. cor. No. 7 a pine post 6″x6″x4′ set 2 ft. in ground and marked '7/275 S. E. Cor.'; whence the N. E. cor. of J. Scully's tract bears south 89 deg. 05′ W. 232 feet distant; thence S. 89 deg. 50 min. west;

750.00 feet to the S. E. cor. No. 8 a pine post 6″x6″x4′ set 2 ft. in ground and marked '8/275 S. W. Cor.'; thence N. 05 deg. 6′ West;

1,512.00 feet to cor. No. 9, a pine post 6″x6″x4′ set two ft. in ground and marked '9/275'; thence N/17 deg. 15′ W.;

2,750.00 feet to cor. No. 10, a pine post 6″x6″x4′ set 2 ft. in ground and marked '10/275'; thence N. 10 deg. 15′ W.;

1,300.00 feet to cor. 11 a pine post 6″x6″x4′ set 2 ft. in ground and marked '11/275'; thence North 34 deg. 53′ West;

1,800.00 feet to cor. No. 12 a pine post 6″x6″x4′ set 2 ft. in ground and marked '12/275'; thence N. 70 deg. 20′ W.;

1,030.00 feet to cor. No. 13 a pine post 6″x6″x4′ set 2 ft. in ground and marked '13/275'; thence N. 39 deg. 28′ W.;

1,570.00 feet to cor. No. 14 a pine post 6″x6″x4′ set 2 ft. in ground and marked '14/275'; thence N. 2 deg. 50′ W.;

1,320.00 feet to cor. No. 15 a pine post 6″x6″x4′ set 2 ft. in ground and marked '15/275'; thence N. 88 deg. 32′ East.

180.00 feet to cor. 16 a pine post 6″x6″x4 ft. set 2 ft. in ground and marked '16/275.'

Whence the S. E. cor. of Block No. 1 Elizabethtown bears S. 88 deg. 32 min. west 60 ft. distant; thence N. 1 deg. 28 Min. West.

1,500.00 feet to cor. No. 17 a pine post 6″x6″x4′ set 2 ft. in ground and marked '17/275'; whence the S. E. cor. of Block 6. E′ Town bears S. 88 deg. 32 Min. W. 60 ft. distant; thence N. 34 deg. 32 Min. East.

322.00 feet to cor. No. 18, a pine post 5″x5″x4 ft. set 2 ft. in ground and marked '18/275'; thence N. 17 deg. 18 Min.
17 West.

1,250.00 feet to cor. No. 19 a pine post 6″x6″x4′ set 2 ft. in ground and marked '19/275'; thence North 18 deg. 30 Min. E.

1,318.00 feet to N. E. cor. No. 20, a pine post 6″x6″x4′ set 2 ft. in ground and marked '20/275. N. E. cor.'; thence N. 89 deg. 30 Min. E.

806.00 feet to N. E. cor. No. 1, point of beginning.

A total area of 260.52.

Less conflict with survey 252, Confidence Millsite, 1.79.

A net area, 258.73.

Containing in all 258.73 acres of land more or less, all in Colfax County, Territory of New Mexico.

And afterwards, to-wit, on March 21st, said writ was returned into said clerk's office with service of same in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

I, Marion Littrell, sheriff of Colfax County, Territory of New Mexico, do hereby certify that I served the within writ of attachment on the 27th day of February, A. D. 1906, upon the within named defendant, Oro Dredging Company, within my said county of Colfax, by attaching and taking into my possession the following described property of defendant:

One dredge; one scow, attached to said dredge; one wood boat, one skiff, buckets, cables, one windmill, pump and tank, one office with its contents; one barn, 12 cords of wood, one machine shop containing tools of various kinds, one gasoline engine, one drill press, one barrel full of oil, two barrels each about half full of oil, stock and dies, various small tools, one large pipe cutter, lumber, five barrels of coal, pipe and steel rods of various sizes, one black-
18 smith shop with a Buffalo forge, anvil and vise, and various hammers and tongs; one Studebaker wagon, one set double harness; and the following furniture—roll top writing desk; 11 chairs, center stand, bed-stead, cot, refrigerator, two carpets, heating stove, cooking stove, dishes, and generally all tools and implements of every description in or near the machine shop and blacksmith shop and office lately used by the said Oro Dredging Company, and all furniture in the house lately used by H. H. Argue. Also the real estate particularly described in a paper attached hereto.

I further certify that I was unable to find the said defendant, Oro Dredging Company, or any officer, director or agent thereof, on whom service could be made and that no person was in the actual possession or occupancy of said real estate.

March 11th, 1906.

MARION LITTRELL,
Sheriff of Colfax County.
By THEO. CAMMARD, *Deputy.*

(Endorsed:) No. 2702. Colfax County. Van Houten vs. Oro Dredging Co. Writ of attachment, return containing description of real and personal property attached. Filed in my office Mar. 21, 1906. Secundino Romero, Clerk.

And afterwards to-wit, on March 21, 1906, there was filed in said clerk's office a motion for appointment of receiver and affidavits in support thereof, in words and figures as follows, to-wit:

19 In the District Court, Fourth Judicial District.

COUNTY OF COLFAX,
Territory of New Mexico:

H. J. REILING
vs.
ORO DREDGING CO.

and

J. VAN HOUTEN
vs.
ORO DREDGING CO.

Motion.

Now comes H. J. Reiling and J. van Houten by Wm. C. Wrigley, and Spiess and Davis, attorneys for plaintiffs in the above entitled suits, and move the court to appoint a receiver to take charge and take into his possession a certain mining dredge now located in the Merino Creek near Elizabethtown, Colfax county, Territory of New Mexico, with power to said receiver to make the necessary repairs on the hull and machinery on said dredge, and to take whatever means may be necessary to protect said dredge from damage from high water on said creek, and any other measures to conserve and take care of said dredge; and further the said receiver be authorized to advertise for sale on sixty days' notice the said dredge.

WM. C. WRIGLEY.
Att'y for H. J. Reiling.
SPIESS AND DAVIS.
Attorneys for J. Van Houten.

(Endorsed:) Motion for receiver filed in open court Mar. 21, 1905. Secundino Romero, Clerk.

20 *Affidavit of J. Van Houten.*

COUNTY OF COLFAX,
Territory of New Mexico:

District Court, Fourth Judicial District.

H. J. REILING
vs.
ORO DREDGING COMPANY.

J. VAN HOUTEN
vs.
ORO DREDGING COMPANY.

J. van Houten being first duly sworn according to law says; that he is the plaintiff in one of the above entitled suits; that under and

by virtue of attachment writs issued in said causes, certain property of the defendant, Oro Dredging Company, has been attached; that the principal item of property so attached is a mining dredge located in the Moreno Valley, Colfax County, Territory of New Mexico,—that said dredge contains expensive machinery for handling large amounts of placer earth containing gold; that the said dredge and machinery cost seventy-five thousand dollars; that it has not been operated for four months, owing to the fact that it is almost impossible to operate the same in the winter, and for other causes; that said dredge and machinery are very much out of repair, and should be repaired at once. In addition the said dredge is surrounded by water and mud, and at almost any time heavy water might come down the stream of water in which said dredge is operated and capsize it, or do other further material injury. That there should be work done to minimize this danger; Deponent further says that he
21 is informed and believes that the said dredge if repaired could be operated and the danger from high water obviated.

J. VAN HOUTEN.

Sworn and subscribed to before me this 17th day of March, 1906.

[SEAL.] WM. A. CHAPMAN,
Notary Public.

My commission expires, Oct. 7th, 1907.

(Endorsed:) Filed in open court Mar. 21, 1905, Secundino Romero, Clerk.

Affidavit of George E. Downey.

COUNTY OF COLFAX,
Territory of New Mexico:

District Court, Fourth Judicial District.

H. J. REILING
vs.
ORO DREDGING COMPANY.

J. VAN HOUTEN
vs.
ORO DREDGE CO.

George W. Downey, being first duly sworn according to law says that he has been a resident of Colfax County, Territory of New Mexico for seven years last. That about five years he was engaged in assisting in the building of a certain mining dredge now located on the Merino Creek near Elizabethtown, Colfax County, Territory of New Mexico, the property of Oro Dredging Company, defendant in above entitled suits. That said dredge was finished in September, 1901. That affiant has been continuously in the employ of said

Oro Dredging Company from September, 1901, until Novem-
22 ber, 1905, in the capacity of carpenter and *piolet*. That as *Piolet* he had charge of a crew of six men, and under the direction of a superintendent, had charge of the dredge during said time; that is, affiant had charge of said dredge during one shift of eight hours every day.

That said dredge is not operated in the winter, owing to the intense cold weather preventing operation; that on the 18th day of November, A. D. 1905, said dredge was pulled to west bank of the said Moreno creek, and laid up for the winter. That affiant is well acquainted with said dredge, the hull and the machinery placed in the same. That the hull leaks, requiring the water that leaks into the hold to be pumped out, three times a day.

That some repairing will have to be done on the machinery. But that the matter requiring immediate attention is the danger from high water coming down the said creek, resulting from the melting of snow in the mountains. Heretofore the dredge has been started to work before said high water came. That said high water might come at any time, and if it came, it would fill up around the dredge with mud, and damage the said dredge. That in the opinion of affiant a large ditch should be cut to carry away the high water; and the dredge should be repaired and started to operate as soon as possible. Affiant further says that there would be no certainty of the ditch preventing the damage and that the best plan would be to start operation at the soonest possible time.

GEORGE E. DOWNEY.

Sworn and subscribed to before me this 19th day of March, 1906.

[SEAL.]

HUGO SEABERG,
Notary Public, Colfax County, N. M.

23 (Endorsed:) Filed in open court Mar. 21, 1905, Secundino Romero, clerk.

And afterwards to-wit, on March 21st, 1906, there was filed in said clerk's office an order of the court appointing special receiver, in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court, Fourth Judicial District.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Attachment.

Order Appointing Special Receiver.

Now, to-wit, this 19th day of March, A. D. 1906, at Chambers, in the Town of Clayton, Union County, Territory of New Mexico.

and within the said Fourth Judicial District, the above entitled cause coming before me on motion of Messrs. Wrigley, Spiess and Davis, for the appointment of a Special Receiver, with power to protect and conserve a certain dredge attached in said suit, and for an order of sale, and having heard the testimony of Wm. C. Wrigley, Esq., and also having heard read by William C. Wrigley, Esq., certain affidavits, and letters in support of said motion, in the matter as presented by the said William C. Wrigley, Esq., and being advised in the premises:

It is hereby ordered that James K. Hunt, be appointed
24 special receiver of the certain mining dredge, located on the Merino Creek, near Elizabethtown, in the County of Colfax, and Territory of New Mexico, owned by the Oro Dredging Company, upon executing a bond in the sum of five thousand ($5,000) dollars, to be approved by the court, with power to said special receiver to repair and protect said dredge from high waters coming down said creek, and in other ways whenever necessary, protect and conserve said dredge, at an expense not to exceed the sum of one thousand dollars until the further orders of this court. Said special receiver being hereby authorized and directed to take possession of said dredge upon the filing and approval of said bond.

Said special receiver to make a report of his acts and doings in this matter, within a convenient time; and said special receiver is further ordered to file with the clerk of this court on or before March 27th, 1906, a list of the stockholders of said Oro Dredging Company, together with their several addresses.

Dated and signed at Clayton, Union County, New Mexico, this 19th day of March, 1906.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) Filed in my office March 21, 1906, Secundino Romero, Clerk.

At a regular term of the District Court of the Fourth Judical District of the Territory of New Mexico, begun and held in and for the County of Colfax at the court house of said county in the City of Raton, New Mexico, commenced on the 4th Monday of March, the same being March 26th, 1906, for the trial of causes arising under the laws of the territory of New Mexico.

25 Present:

Hon. Wm. J. Mills, Chief Justice of the Territory of New Mexico, and Judge of the Fourth Judicial District Court thereof.
Hon. J. Leahy, District Attorney.
Hon. Marion Littrell, Sheriff.
Secundino Romero, Clerk.

And afterwards to-wit, on Wednesday, April 4th, 1906, the same being the 9th day of said March term, the following among other proceedings were had to-wit:

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Comes now the plaintiff in the above entitled cause by his counsel and files affidavit for publication therein:—in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

Stephen B. Davis, Jr., being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiff in the above entitled cause; That it appears from the return of the sheriff of Colfax County, New Mexico, upon the writ of attachment and summons issued in the above entitled cause, that the defendant, Oro Dredging Company, was not to be found within the said County of Colfax, and that no officer, director or designated agent of said defendant is within the said County of Colfax or within the Territory of New Mexico to the knowledge of affiant; that the said defendant, Oro Dredging Company, has heretofore designated an agent upon whom service of process against it might be made, stating in the certificate of such designation that such agent resided in the Town of Elizabethtown, in the said County of Colfax, but that said named person is not now to be found within said county.

Affiant therefore states that process cannot be served upon the said defendant otherwise than by publication, and now moves the court to make an order requiring the said defendant to cause its appearance to be entered in said cause as is provided by law.

STEPHEN B. DAVIS, JR.

Subscribed and sworn to before me this 28th day of March, 1906.

[SEAL.] LOUIS C. ILFELD,
Notary Public.

(Endorsed:) Filed in open court April 4th, 1906, Secundino Romero, clerk.

And afterwards, to-wit, on Wednesday, April 4th, 1906, the same being the 9th day of March term of court, the following among other proceedings were had, to-wit:

27 TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

It appearing to the court from the return of the sheriff of Colfax County, New Mexico, upon the writ of attachment and summons issued in the above entitled cause, that the defendant, Oro Dredging Company, was not served by said sheriff for the reason that it could not be found within the said County of Colfax, and it further appearing to the court from the affidavit filed in this court, that process cannot be served upon said defendant, otherwise than by publication, now on motion of Charles A. Spiess, and S. B. Davis, Jr., attorneys for plaintiff in said cause:

It is hereby ordered by the court that the defendant, Oro Dredging Company, cause its appearance to be entered in said cause on or before the 25th day of April, 1906; that a copy of this order be inserted in the Raton Range, a newspaper published in Colfax County, New Mexico, once each week, for at least three weeks, and that a copy hereof shall also be posted in three public places in the said County of Colfax for at least three weeks.

And it is further ordered by the court that unless the said defendant enter*ed*, or cause to be entered, its appearance in said cause, on or before the said 25th day of April, 1906, the clerk of this court shall enter an appearance in said cause for the said defend-
28 ant, and the above entitled cause shall proceed as though the said defendant had entered its appearance therein.

Done in open court at Raton, New Mexico, this 29th day of March, A. D. 1906.

WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards, to-wit, on April 3rd, 1906, there was issued out of said clerk's office a notice of publication in words and figures as follows, to-wit:

Notice.

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

It appearing to the court from the return of the sheriff of Colfax County, New Mexico, upon the writ of attachment and summons issued in the above entitled cause, that the defendant Oro Dredging Company, was not served by said sheriff for the reason that it could not be found within the said County of Colfax and it further appearing to the court from the affidavit filed in this court that process cannot be served upon said defendant otherwise than by publication, now on motion of Spiess & Davis, attorneys for plaintiff in said cause:

It is hereby ordered by the court that the defendant, Oro Dredging Company, cause its appearance to be entered in said
29 cause, on or before the 25th day of April, A. D. 1906; that a copy of this order be inserted in the Raton Range, a newspaper published in Colfax County, New Mexico, once each week for at least three weeks, and that a copy hereof shall also be posted in three public places in the said County of Colfax for at least three weeks.

And it is further ordered by the court that unless the said defendant enter, or cause to be entered, its appearance in said cause on or before the said 25th day of April, 1906, the clerk of this court shall enter an appearance in said cause for the said defendant, and the above entitled cause shall proceed as though the said defendant had entered its appearance therein.

Done in open court at Raton, New Mexico, this 29th day of March, 1906.

[SEAL.] WILLIAM J. MILLS
Chief Justice, etc.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

I, Secundino Romero, Clerk of the Fourth Judicial District of said territory, and ex-officio clerk of said District Court sitting within and for the County of Colfax, certify that the foregoing to which this

certificate is attached is a true copy of the order of court for notice of publication on file and of record in the above entitled cause.

30 Witness my hand and the seal of said court, this 3rd day of April, 1906.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

And afterwards, to-wit, on April 30th, 1906, there was filed in said clerk's office a proof of publication, in words and figures as follows, to-wit:

Proof of Publication.

TERRITORY OF NEW MEXICO,
County of Colfax:

Orrin C. Foster, being duly sworn, declares and says that he is foreman of the Raton Range, a newspaper published and having a general circulation in the City of Raton, County of Colfax, and Territory of New Mexico; that the publication, a copy of which is hereto attached, was published in said paper, in the regular and entire issue of every number of the paper during the period and time of publication, and that the notice was published in the newspaper proper and not in a supplement, for three weeks consecutively, the first publication being on the 4th day of April, 1906, and the last publication on the 18th day of April, 1906.

ORRIN C. FOSTER, *Foreman.*

Sworn and subscribed to before me, a notary public in and for the County of Colfax, and Territory of New Mexico, this 23rd day of April, 1906.

WM. A. CHAPMAN,
Notary Public.

My commission expires Oct. 7th, 1907.

Bill.....$14.30

Received payment.
THE RATON PUB. CO.,
Per O. C. FOSTER.

31 And afterwards, to-wit, on April 5th, 1906, there was filed in said clerk's office a list of the stockholders of the Oro Dredging Company, in words and figures as follows, to-wit:

APRIL 3RD, 1906.

Mr. James K. Hunt, Raton.

DEAR SIR: As far as I know the following is a correct list of the stockholders of the Oro Dredging Company:—

H. J. Reiling, Shirley Hotel, Denver.
John K. Robinson, c/o H. J. Reiling.
Mrs. John S. Butler, No. 529 Stock Exchange Bldg., Chicago.
M. M. Jones, c/o Libby, McNeil & Libby, Chicago.

F. C. Rutan, No. 1224 1st Nat'l Bank Bldg., Chicago.
Irving Usner, No. 292, Wabash Ave., Chicago.

J. VAN HOUTEN.

J. van Houten of Raton, N. M., is also a stockholder.

And afterwards, to-writ, on April 5th, 1906, there was filed in said clerk's office a letter and certificate of the clerk of said court in words and figures as follows, to-wit:

Office of Secundino Romero, Clerk of District Court.

Department of Justice,
Territory of New Mexico, Fourth Judicial District.

LAS VEGAS, N. M., *April 5th*, 1906.

——— ———, Esq.

DEAR SIR: The property of the Oro Dredging Company, situated in this county has been attached by Mr. J. van Houten, and
32 H. J. Reiling, for sums aggregating *from* $9,000,—several other suits have been brought against the same company.

The Judge of this court to conserve the property has placed the same in the hands of a special receiver.

In the attachment cases service will be completed on April 25th, and this notice is given you as well as the other stockholders, whose names are known, by direction of the judge of this court, so that you can either individually or jointly with the other stockholders, take such steps as you may deem best to protect your interests in the property.

Very truly yours,

SECUNDINO POMERO,
Clerk Colfax County, N. M.

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court, Fourth Judicial District.

I, Secundino Romero, Clerk of the District Court, sitting within and for the County of Colfax, hereby certify that I have this 5th day of April, 1906, mailed a copy of the notice heretō attached to the following persons, postage prepaid:

H. J. Reiling, Shirley Hotel, Denver, Colo.
John K. Robinson, c/o H. K. Reiling, Denver, Colorado.
Mrs. John S. Butler, 529, Stock Exchange, Chicago, Ill.
M. M. Jones, c/o Libby, McNeil and Libby, Chicago, Ill.
F. C. Rutan, No. 1224, 1st Nat'l Bank Bldg., Chicago.
Irving Usner, 292 Wabash Ave., Chicago.

33 Witness my hand and the seal of said court this 5th day of April, 1906.

[SEAL.] SECUNDINO ROMERO, *Clerk*.

And afterwards, to-wit, on April 30th, 1906, there was filed in said clerk's office a proof of posting of notice of publication in words and figures as follows, to-wit:

District Court, Fourth Judicial District, County of Colfax, New Mexico.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

William C. Wrigley, being first duly sworn according to law deposes and says, that a copy of the attached order of court (being printed notice of publication clipped from Raton Range)—and the certificate thereto attached, was posted in three public places in the County of Colfax and Territory of New Mexico, from the 3rd day of April, 1906, to and including the 25th day of April, 1906.

WM. C. WRIGLEY.

Subscribed and sworn to before me this 26th day of April, 1906.
[SEAL.] WM. A. CHAPMAN,
Notary Public.
My commission expires Oct. 7th, 1907.

34 And afterwards, to-wit, on April 30th, there was issued out of and filed in said clerk's office a certificate of no appearance of defendant, in words and figures as follows, to-wit:

Certificate of No Appearance.

TERRITORY OF NEW MEXICO,
County of Colfax:

Fourth Judicial District Court.

No. 2702.

J. VAN HOUTEN
vs.
ORO DREDGING COMPANY.

I, Secundino Romero, Clerk of said court, certify that no appearance by or for the defendant in the above entitled cause, has been entered in my office or of record and that said defendant has been

duly served with process by publication as required by law, as shown by the proof thereof on file.

Witness my hand and the seal of said court this 30th day of April, 1906.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

(Endorsed:) No. 2702. District Court, County of Colfax. J. van Houten vs. Oro Dredging Company. Certificate of non-appearance. C. A. Spiess, S. B. Davis, Jr., Attorneys for plaintiff. Filed in my office Apr. 30th, 1906. Secundino Romero, Clerk.

And afterwards, to-wit, on May 7th, 1906, there was filed in said clerk's office an order of the court, which order is in words and figures as follows to-wit:

35 TERRITORY OF NEW MEXICO,
County of Colfax:

District Court, Fourth Judicial District, Sitting in and for the County of Colfax.

In Chambers, in the City of Las Vegas, within said Fourth Judicial District.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

And Now, to-wit, this first day of May, 1906, it appearing that due service by publication has been made of the order of court made on the 29th day of March, 1906, directing that publication be made according to law, and it further appearing by the certificate of the clerk that no appearance has been entered by defendant, the Oro Dredging Company, now on motion of Speiss and Davis, it is hereby ordered that the clerk of this court be directed to enter the appearance of said defendant in the above entitled cause.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 2702. District Court, Colfax County. J. van Houten, plaintiff vs. Oro Dredging Company, def't. Order of court. Filed in my office May 7th, 1906. Secundino Romero, clerk.

And afterwards, to-wit, on May 7th, 1906, there was filed in said clerk's office an order of sale, which said order of sale is in words and figures as follows to-wit:

36 TERRITORY OF NEW MEXICO,
County of Colfax:

District Court, Fourth Judicial District, Sitting in and for the County of Colfax.

In Chambers, in the City of Las Vegas, within said Fourth Judicial District.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Now, to-wit, this first day of May, 1906, the above entitled cause coming on for hearing on motion of Spiess and Davis appearing for plaintiff, for an order directing the Honorable James K. Hunt, receiver of a certain mining dredge located on the Merino Creek, in Colfax County, Territory of New Mexico, attached under and by virtue of a writ of attachment issued in above entitled suit, to sell the same, and the court having considered testimony heretofore produced before him on the application for the appointment of a receiver and the further testimony of Wm. C. Wrigley, Esq., attorney for plaintiff in the suit of H. J. Reiling vs. Oro Dredging Company, brought in this court, and finding that it is expensive to protect and conserve same dredge, and that the same is deteriorating in value, and that the best interest of the defendant, Oro Dredging Company, as well as of creditors and all parties in the same are best protected by a speedy sale of said dredge, and it further appearing that although due publication has been made according to law of
37 the pendency of said suit, no appearance has been entered for defendant:—

It is hereby ordered, that the said Receiver, James K. Hunt, Esq., be, and is hereby directed to sell said dredge at public auction in the City of Raton at the front door of the court house, after thirty (30) days' notice of the time and place of sale, to the highest bidder, for cash, and said receiver is hereby directed to report to the court his proceedings in this behalf and await such further orders as may be made in the premises.

The notice aforesaid is to be given by publication once a week for four successive weeks, in the Raton Range, a newspaper published in the said City of Raton.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 2702, District Court, Colfax County. J. van Houten, plaintiff vs. Oro Dredging Company, defendant. Order of sale. Filed in my office May 7, 1906, Secundino Romero, Clerk.

And, afterwards, to-wit, on July 19th, 1906, there was filed in said clerk's office a Receiver's Report, in words and figures as follows, to-wit:

38 TERRITORY OF NEW MEXICO,
County of Colfax, ss:

District Court, Fourth Judicial District, County of Colfax, Territory of New Mexico.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING CO., Defendant.

Receiver's Report.

Comes now, James K. Hunt, Receiver appointed by said court, to conserve, protect and sell a certain mining dredge attached in said suit, by virtue of a writ of attachment issued in said cause, and says, that on the 26th day of June, 1906, at the hour of ten o'clock A. M. in pursuance of a published notice, proof of the publication of the same being hereunto appended and made a part of this report, he proceeded to the court house, in the City of Raton, to sell said dredge. That at the request of two persons, representing themselves to be prospective bidder- for said dredge, to adjourn said sale until two o'clock of said day, he inquired first, of the by-standers present, if there was any objections to said postponement, and there being none, he then and there postponed said sale until two o'clock of said day, at which hour, at the front door of said court house, he proceeded to sell said dredge, and Charles Springer, having bid for said dredge, and the equipment thereof, the sum of five thousand dollars, and he being the highest bidder for said dredge, said receiver, then and there sold said dredge to said Charles Springer, for the sum
39 of five thousand dollars in cash, which said money he deposited to the credit of James K. Hunt, receiver, in the First National Bank, of the city of Raton.

I further report that I executed and delivered to said Charles Springer a certificate of sale of said dredge.

JAS. K. HUNT, *Receiver.*

Sworn and subscribed to before me this 26th day of June, A. D. 1906.

[SEAL.] C. A. NYHUS,
Notary Public.

And, afterwards, to wit, on August 2nd, 1906, there was filed in said clerk's office an appearance of F. H. Jones, as trustee, which said appearance is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO:

In the Fourth Judicial District Court in and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Attachment.

Appearance.

We hereby enter the appearance of Frank H. Jones, as Trustee of The Oro Dredging Company, a Bankrupt, and our appearance as his attorneys, for the purpose of moving the court to enter an order in this cause dissolving the attachment heretofore issued and levied herein upon the property of the said The Oro Dredging Company, and also the subsequent proceedings, if any, had thereon, and also for an order upon James K. Hunt, heretofore appointed by this court as receiver herein, directing him to turn over to said Trustee all property which came into his possession as such receiver, and for no other purpose whatever.

SCOTT, BANCROFT, LORD & STEPHENS,
Office and Post Office Address,
184 *La Salle St., Chicago, Ill.;*
ELMER E. STUDLEY,
Office and Post Office Address,
Raton, N. M.,
Attorneys for Frank H. Jones, as Trustee of
The Oro Dredging Company, a Bankrupt.

(Endorsed:) No. 2702. Territory of New Mexico, Fourth Judicial District Court, in and for Colfax County. J. van Houten, plaintiff, vs. Oro Dredging Company, defendant. Appearance. Filed in my office Aug. 2nd, 1906. Secundino Romero, Clerk.

And afterwards, to wit, on August 2nd, 1906, there was filed in said clerk's office a notice of a motion, and motion by the attorneys for Frank H. Jones, trustee, which said notice and motion is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO:

In the Fourth Judicial District Court in and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Attachment.

Notice of Motion.

You are hereby notified, That on Friday morning, August
41 3rd, 1906, at the Chambers of the Judge of the Fourth Judicial District Court, in the City of Las Vegas, County of San Miguel, Territory of New Mexico, at the hour of ten o'clock in the forenoon of that day, or so soon thereafter as counsel can be heard, We, the undersigned, Scott, Bancroft, Lord & Stephens, and Elmer E. Studley, as attorneys for and on behalf of Frank H. Jones, Trustee in Bankruptcy, of the said Oro Dredging Company, a bankrupt, will make a motion before the court for the entry of an order dissolving the writ of attachment heretofore issued in this cause, and the subsequent proceedings, if any, held thereon, and also for an order upon the receiver, James K. Hunt, heretofore appointed by this Court as receiver herein, directing him to turn over to said trustee in bankruptcy all property that came into his possession as such receiver, in accordance with the motion, a copy of which is hereto attached and herewith served upon you.

SCOTT, BANCROFT, LORD & STEPHENS,
ELMER E. STUDLEY,
Attorneys for Frank H. Jones, as Trustee of Oro Dredging Company, a Bankrupt.

To Stephen Davis and Charles A. Spiess, Attorneys for Plaintiff, and to James K. Hunt, Receiver.

(Endorsed:) No. 2702. Territory of New Mexico, Fourth Judicial District, County of Colfax. J. van Houten, plaintiff, vs. Oro Dredging Company, defendant. Notice of motion and motion. Filed in my office Aug. 2nd, 1906. Secundino Romero, Clerk.

42 *Motion.*

TERRITORY OF NEW MEXICO:

In the Fourth Judicial District Court in and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Attachment.

Motion.

Now comes Frank H. Jones, as Trustee of the Oro Dredging Company, a bankrupt, by Scott, Bancroft, Lord & Stephens, and Elmer E. Studley, his attorneys, and moves the court to enter an order herein dissolving the attachment heretofore issued and levied in this cause upon the property of said Oro Dredging Company, described in the return thereof, and the subsequent proceedings, if any, had thereon, and also for an order upon the receiver, James K. Hunt, heretofore appointed by this court as Receiver herein, directing him to turn over to said Frank H. Jones, as trustee of said Oro Dredging Company, a bankrupt, all property of said Oro Dredging Company, which came into his possession as such receiver, and for grounds of such notice shows the following:

1. That on to wit, the 12th day of March, A. D. 1906, a petition in bankruptcy was filed in the District Court of the United States for the Eastern Division of the Northern District of Illinois, against the said The Oro Dredging Company, and praying that it be
43 adjudged a bankrupt within the purview of the Act of Congress relating to Bankruptcy.

2. That, thereafter, such proceedings were had in said cause that the said The Oro Dredging Company was on or about the 23rd day of April, 1906, by said United States District Court duly adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to Bankruptcy.

3. That thereafter, and on, to wit, the 9th day of July, A. D. 1906, the said Frank H. Jones was duly appointed as trustee of the said The Oro Dredging Company, a bankrupt, and filed his bond and duly qualified as and now is such trustee.

4. That by virtue of the Acts of Congress relating to bankruptcy and particularly by section 70 of said act, the said Frank H. Jones, upon his appointment and qualification as such trustee as aforesaid, became vested by operation of law with the title of the said bankrupt as of the date it was adjudicated a bankrupt to all property of said bankrupt wherever situated.

5. That on or about the 27th day of February, 1906, a writ of attachment was issued in the above entitled cause and was levied upon certain property of the said The Oro Dredging Company, situated in Colfax County, in the Territory of New Mexico, and that under the provisions of said acts of Congress, and particularly of section 67*f* thereof, by virtue of said adjudication of bankruptcy the lien of said attachment became and is null and void, and the property affected by said attachment passed to the said Frank H. Jones, as trustee of the said The Oro Dredging Company, a bank-
44 rupt, wholly released and discharged from the same, and the said trustee is now entitled to the possession thereof.

FRANK H. JONES,
As Trustee of The Oro Dredging Company, a Bankrupt,
By SCOTT, BANCCROFT, LORD & STEPHENS, *His Attorneys.*

SCOTT, BANCROFT, LORD & STEPHENS,
ELMER E. STUDLEY,
Attorneys for Frank H. Jones, as Trustee of the Oro Dredging Company, a Bankrupt.

TERRITORY OF NEW MEXICO,
County of Colfax:

George N. B. Lowes, being first duly sworn according to law deposes and says, that he is the duly authorized agent of Frank H. Jones, as trustee of The Oro Dredging Company, a bankrupt, in this behalf, and makes this affidavit as such agent; that he has read the grounds of motion above set forth, and knows the contents thereof, and that the matters therein stated are true.

GEORGE N. B. LOWES.

Subscribed and sworn to before me this 28th day of July, A. D. 1906.

[SEAL.]

T. D. LEIB,
Notary Public in and for the County of Colfax, Territory of New Mexico.

My commission expires Aug. 1, 1906.

(Endorsed:) Filed in my office Aug. 2nd, 1906, Secundino Romero, Clerk.

45 And afterwards, to wit, on August 3rd, 1906, there was filed in said clerk's office a Motion by plaintiff to strike from the files of said court the motion of Frank H. Jones, in words and figures as follows, to wit:

District Court, Fourth Judicial District, County of Colfax, Territory of New Mexico.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Comes now the plaintiff in the above entitled cause, by Charles A. Spiess, and S. B. Davis, Jr., and moves to strike from the files of said court the motion of Frank H. Jones, alleged to be the trustee of the Oro Dredging Company, alleged to be a bankrupt, and for reason therefor says:

1st. That said motion is insufficient and irregular on its face and does not present sufficient reason to warrant the court in granting the relief asked for by said motion.

2nd. That said motion is not the proper procedure to obtain the relief asked for by it.

3rd. That said motion represents many matters of fact that cannot be determined according to law in proceedings upon said motion.

4th. That the mover of said motion is a stranger to the record.

5th. That the mover has not obtained the consent of the court first to file said motion.

6th. That the matter of the appointment and qualification
46 of the trustee named in the motion is the assertion of a fact that the law provides no means of determining in proceedings on motion.

7th. That the affidavit supporting said motion was irregular and insufficient.

8th. That the matters alleged in said motion are such that the court cannot be fully advised on in proceedings on motion.

9th. That the motion shows on its face that the interest of other parties than the record parties would be affected by the sustaining of said motion.

CHARLES A. SPIESS.
STEPHEN B. DAVIS.

(Endorsed:) No. 2702. J. van Houten vs. Oro Dredging Company. Motion to strike out. Filed in my office Aug. 3rd, 1906. Secundino Romero, Clerk.

And afterwards, to wit, on August 3rd, 1906, there was filed in said clerk's office an order of court sustaining Motion to strike out, in words and figures as follows to wit:

TERRITORY OF NEW MEXICO,
Fourth Judicial District,
In and for the County of Colfax:

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Now, to wit, on this 3rd day of August, 1906, at Chambers, in the City of Las Vegas, within said Fourth Judicial District, the Motion of plaintiff in the above entitled cause to strike from the files the motion of Frank H. Jones, alleged trustee of the Oro
47 Dredging Company, coming on to be heard, and the court having heard Spiess and Davis and William C. Wrigley, in support of said motion, and Elmer E. Studley and George N. B. Lowes, against said Motion, and being advised in the premises it is hereby Ordered that said motion be sustained.

WILLIAM J. MILLS,
Chief Justice, etc.

(Endorsed:) No. 2702. Fourth Judicial District, County of Colfax. J. van Houten, plaintiff, vs. Oro Dredging Co., defendant. Order sustaining motion to strike out. Filed in My office Aug. 3rd, 1906. Secundino Romero, clerk. Ent. Rec. H, p. 368.

And afterwards, to wit, on August 4th, 1906, there was filed in said clerk's office, a paper, in words and figures as follows, to wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 13242.

In the Matter of ORO DREDGING COMPANY, Bankrupt.

This matter coming on to be heard upon the motion of Frank H. Jones, trustee herein, and the petition of said trustee filed in support of said motion, having been duly considered by this court; and it appearing to this court that the Honorable Sidney C. Eastman, referee in Bankruptcy herein, to whom this cause was referred by Judge Landis, is absent from the state, and this matter
48 coming on to be heard before me in the absence of said referee Eastman; the court finds that this is an emergency matter, and that Frank H. Jones, trustee, should be authorized to intervene in certain attachment suits started in Colfax county, in the Territory of New Mexico.

It is therefore adjudged and decreed that Frank H. Jones, trustee of the Oro Dredging Company, Bankrupt, be and he is hereby authorized to intervene in all attachment suits and other suits brought

in the county of Colfax, in the Territory of New Mexico against the Oro Dredging Company, or that he may institute a separate suit or suits to recover possession of the property of said Oro Dredging Company, as he may be advised.

FRANK L. WEAN, *Referee.*

August 2nd, 1906.

(Endorsed:) No. 2702. In the 4th Judicial District court in and for the territory of New Mexico, county of Colfax. J. van Houten, plaintiff, vs. The Oro Dredging Co., defendant. Authorization to intervene by the court of bankruptcy. Filed in my office Aug. 4th, 1906. Secundino Romero, Clerk.

And afterwards, to wit, on August 4th, 1906, there was filed in said clerk's office an order of the court allowing Frank H. Jones, Trustee, to intervene, in words and figures as follows, to wit:

49 TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court for the Fourth Judicial District, Territory of New Mexico, Sitting Within and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

On motion of Frank H. Jones, as Trustee of the Oro Dredging Company, a bankrupt, for leave to file an intervening petition herein, Elmer E. Studley, and Scott, Bancroft, Lord and Stephens, appearing for said Trustee, and S. B. Davis, Jr., appearing for plaintiff, and objecting to the hearing of said motion for want of five days' notice:

And the court having heard arguments of counsel and being duly advised in the premises:

It is ordered, adjudged and decreed by the court that leave be and the same is hereby given to said Frank H. Jones, as trustee of the Oro Dredging Company, a bankrupt, to file his intervening petition herein instanter, without prejudice to any right of the said plaintiff to move to strike said petition from the files:

And the said plaintiff by his attorneys excepts to the ruling of the court granting said leave, for want of five days' notice.

Done in Chambers at Las Vegas, this August 4th, 1906.

WILLIAM J. MILLS,
Chief Justice, etc.

50 (Endorsed:) No. 2702. District court, Colfax county, J. van Houten, plaintiff, vs. Oro Dredging Company, defendant. Order allowing F. H. Jones, trustee, to intervene. Filed in my office Aug. 4th, 1906. Secundino Romero, Clerk. Ent. Rec. H, page 369.

And afterwards, to wit, on August 4th, 1906, there was filed in said clerk's office an Intervening petition of Frank H. Jones, Trustee, in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court for the Fourth Judicial District, Territory of New Mexico, Sitting Within and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

Intervening Petition.

To the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District Court thereof, sitting within and for the County of Colfax:

Your petitioner, Frank H. Jones, of the City of Chicago, County of Cook, State of Illinois, as Trustee of The Oro Dredging Company, a bankrupt, pursuant to leave of the United States District Court of the Eastern Division for the Northern District of Illinois, files this his intervening petition in the above entitled cause, and thereupon your petitioner shows and represents to the court as follows:

(1) That your petitioner, as such trustee, has an interest in the matter in litigation in the above entitled action.

(2) That the above entitled action was instituted in this court on the 23rd day of February, 1906, against The Oro Dredging Company, a corporation organized under the laws of the State of Illinois, and an attachment issued therein.

(3) That on, to wit, the 27th day of February, 1906, said attachment writ was levied upon certain property of said defendant, the Oro Dredging Company, situate in the county of Colfax and Territory of New Mexico, including a mining dredge, real estate and certain personal property as described in the return of said writ, and that the value of the property so attached, exceeds the value of the sum of $10,000.

(4) That on or about the 19th day of March, A. D. 1906, an order was entered in this court in said suit appointing James K. Hunt, as special receiver of said dredge.

(5) That on to wit: the 12th day of March, 1906, a petition in bankruptcy was filed in the District Court of the United States for the Eastern Division of the Northern District of Illinois, against the Oro Dredging Company, which is the said The Oro Dredging Company mentioned as defendant in the above entitled suit, praying that

the said The Oro Dredging Company be adjudged a bankrupt within the purview of the acts of Congress relating to bankruptcy.

(6) That thereafter, such proceedings were had in the said
52 bankruptcy proceedings, that the said The Oro Dredging Company was to wit: on the 23rd day of April, A. D. 1906, by an order duly entered in said proceedings on that day by the said United States District Court, duly adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, a copy of which said order of adjudication is hereto attached, and marked Exhibit "A" and made a part hereof.

(7) That thereafter and on to wit, the 9th day of July, A. D. 1906, your petitioner Frank H. Jones, by order of the court that day entered in said bankruptcy proceedings, was duly appointed as trustee of the said The Oro Dredging Company, a bankrupt, a copy of which order is hereto attached marked Exhibit "B," and made a part hereof.

(8) That on to wit, the 16th day of July, 1906, your petitioner duly qualified as such trustee, by filing his bond as required by said District Court, and the said bond was on the said 16th day of July, A. D. 1906, by order of court entered in said proceedings duly approved by the court, a copy of which order approving said bond is hereto attached and marked Exhibit C, and made a part hereof, and thereupon, your petitioner became and now is the duly qualified trustee of said The Oro Dredging Company, a bankrupt.

(9) That an order has been duly entered by the said court in said bankruptcy proceedings granting to your petitioner, as such trustee, leave to intervene, in the above entitled suit, a copy of which said order petitioner prays leave to hereafter attach hereto as a part hereof, as Exhibit D.

(10) Your petitioner further represents that at the date of
53 the bringing of the above entitled suit, the said The Oro Dredging Company was and for some time prior thereto had been insolvent.

(11) That by virtue of the Acts of Congress relating to bankruptcy, and particularly section 70 of said Act, upon his appointment and qualification as trustee as aforesaid, the said Frank H. Jones, as such trustee, became vested by operation of law with the title of the said bankrupt, as of the date it was adjudicated bankrupt, to wit: April 23rd, 1906, to all property of the said bankrupt, wherever situate.

(12) That the said James K. Hunt claims and pretends that pursuant to an order of this court entered herein on the 1st day of May, A. D. 1906, he sold said Dredge to one Charles Springer for the sum of five thousand dollars, but your petitioner shows that the said sale, if any was had, was void, as to this petitioner, and no title passed by reason thereof to the alleged purchaser.

(13) That by virtue of the acts of Congress relating to bankruptcy, and particularly section 67-F thereof, upon the adjudication of bankruptcy of said The Oro Dredging Company as aforesaid, the lien of the attachment in the above suit became and is null and void, and the property affected by said attachment passed to your petitioner as such trustee wholly released and discharged from the same, and that your

petitioner is now entitled to the possession and control thereof, free and clear from any lien by reason of said attachment or any sale had thereunder, subsequent to the filing of said petition in bankruptcy.

(14) Your petitioner further represents that the filing of said petition in bankruptcy was notice to all the world of the pendency thereof, and that at the time of the said pretended sale the said plaintiff, the said receiver, James K. Hunt, and the said purchaser Charles
54 Springer, and each of them had notice of the pendency of said bankruptcy proceedings and reasonable cause for inquiry, and that the said Charles Springer was not a bona fide purchaser for value, and that the said order of May 1st, 1906, for the sale of said dredge was improvidently granted and conferred no authority upon the said receiver, James K. Hunt, to sell said dredge; that the value of said dredge was and is greatly in excess of the sum of $5,000—and that the said order should be set aside and said pretended sale vacated, said attachment dissolved, and the possession of said dredge and all property attached in the above cause should be turned over to your petitioner, Frank H. Jones, as trustee of the Oro Dredging Company, a bankrupt.

(15) Your petitioner therefore prays that the said order of May 1st, 1906, ordering the sale of said dredge may be set aside, and that the said pretended sale may be vacated, the attachment herein dissolved, and the property affected thereby turned over to your petitioner as trustee of the said The Oro Dredging Company, bankrupt; and petitioner prays for such other and further or different relief as to the court shall seem me-t and proper.

FRANK H. JONES,
As Trustee of The Oro Dredging Company, a Bankrupt,
By SCOTT, BANCROFT, LORD & STEPHENS,
His Attorneys.

SCOTT, BANCROFT, LORD & STEPHENS,
184 *La Salle St., Chicago, Ill.,*
ELMER E. STUDLEY, *Raton, N. M.,*
Attorneys for said Petitioner.

55 TERRITORY OF NEW MEXICO,
County of San Miguel:

George N. B. Lowes, being first duly sworn according to law, deposes and says:

That he is the agent for the petitioner in the above mentioned petition, and as such agent makes this affidavit for and on behalf of the said petitioner; that he has read the above and foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein alleged to be upon information and belief, and as to those matters he believes them to be true; that the reason why this petition is not verified by the oath of the said petitioner is because the said petitioner is

not within the County of San Miguel, and is unable to sign said petition, and make the necessary affidavit, being now in the City of Chicago, County of Cook, State of Illinois.

GEORGE N. B. LOWES.

Subscribed and sworn to before me this 4th day of August, 1906.

[SEAL.] LOUIS C. ILFELD,
Notary Public, San Miguel County.

56 EXHIBIT A.

In the District Court of the United States for the Northern District of Illinois, Monday, April 23rd, A. D. 1906.

Present: The Hon. S. H. Bethea, Judge.

No. 13242.

In the Matter of THE ORO DREDGING CO., Bankrupt.

At Chicago, in said district, on the 23rd day of April A. D. 1906, before the Honorable Solomon H. Bethea, judge of said court in bankruptcy, the petition of Irving Usner et al., that the said The Oro Dredging Co., be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said The Oro Dredging Co., is hereby declared and adjudged bankrupt accordingly.

EXHIBIT B.

In the District Court of the United States for the Northern District of Illinois.

No. 13242.

In the Matter of ORO DREDGING COMPANY, Bankrupt.

It appearing that Sidney C. Eastman, the referee to whom said cause is referred is absent from said district; and

On this ninth day of July, A. D. 1906, this cause coming on for a first meeting of the creditors, and it appearing to the court that due notice of the first meeting of the creditors of the bankrupt has
57 been given by mailing notices to all creditors named in the schedule, at least ten days before this date, and by publication in the Chicago Legal News, the last publication being at least one week before this date, as required by law, and the rules of this court;

It is therefore ordered, that a first meeting of the creditors of said bankrupt be held according to said notice;

Whereupon, pursuant to said notice, the first meeting of creditors was held at Room 905, Monadnock Block, Chicago, Illinois, being the office of the referee, on the ninth of July, A. D. 1906, at the hour of 10 A. M.

It is hereby ordered that all claims be allowed pro tempore; objections to be filed in 10 days; notice of filing objections to be served on claimant by mail or on local attorney at once.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the Chicago Legal News, I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts, and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do appoint Frank H. Jones, of Chicago, in the County of Cook and State of Illinois, as trustee of the same, with bond in the sum of one thousand dollars.

Adjourned to August 15th, 1906, at 10 o'clock A. M.

FRANK L. WEAN,
Referee in Bankruptcy.

58 EXHIBIT C.

Order Approving Trustee's Bond.

At a Court of Bankruptcy Held in and for the Northern District of Illinois, at Chicago, this 16th day of July, 1906, before Sidney C. Eastman, Referee in Bankruptcy.

In the District Court of the United States for the Northern District of Illinois.

In Bankruptcy.

In the Matter of ORO DREDGING COMPANY, Bankrupt.

It appearing to the court that Frank H. Jones, of Chicago, and in said district, has been duly appointed trustee of the estate of the above named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the order of the court, to-wit, *on* the sum of one thousand dollars, it is ordered that the said bond be and the same is hereby approved.

SIDNEY C. EASTMAN,
Referee in Bankruptcy.

59 EXHIBIT D.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 13242.

In the Matter of THE ORO DREDGING COMPANY, Bankrupt.

This matter coming on to be heard upon the motion of Frank H. Jones, trustee herein, and the petition of said trustee filed in support of said motion, having been duly considered by this court; and it appearing to this court that the Honorable Sidney C. Eastman, Referee in Bankruptcy herein, to whom this cause was referred by Judge Landis, is absent from the state, and this matter coming on to be heard before me in the absence of said Referee Eastman; the court finds that this is an emergency matter, and that Frank H. Jones, trustee, should be authorized to intervene in certain attachment suits started in Colfax County, in the Territory of New Mexico.

It is therefore adjudged and decreed that Frank H. Jones, trustee of the Oro Dredging Company, bankrupt, be and he is hereby authorized to intervene in all attachment suits and other suits, brought in the County of Colfax, in the Territory of New Mexico, against the Oro Dredging Company, or that he may institute a separate suit or suits to recover possession of the property of said Oro Dredging Company, as he may be advised.

FRANK L. WEAN, *Referee.*

August 2nd, 1906.

60 And afterwards, to-wit, on August 22nd, 1906, there was filed in said clerk's office a demurrer to the intervening petition, in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Comes now the plaintiff in the above entitled cause, by Charles A. Spiess, and S. B. Davis, Jr., his attorneys and demurs to the intervening petition of Frank H. Jones, filed in said cause, on the ground that the said petition does not state facts sufficient to constitute a defense to the complaint of plaintiff, and does not state facts sufficient to constitute a cause of action against plaintiff, and does

not set up facts showing that the said Frank H. Jones has any interest in the matter in litigation in said cause, in the success of either of the parties to said action or as against both of them.

CHARLES A. SPIESS AND
S. B. DAVIS, JR.,
Attorneys for Plaintiff, Las Vegas, N. M.

(Endorsed:) No. 2702. District Court. Colfax County. J. van Houten vs. Oro Dredging Co. Demurrer to intervening petition. Filed in my office Aug. 22nd, 1906. Secundino Romero, Clerk.

And afterwards, to-wit, on August 22nd, 1906, there was filed in said clerk's office a motion for judgment, in words and figures as follows, to-wit:

61 TERRITORY OF NEW MEXICO,
County of Colfax:

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Comes now the plaintiff in the above entitled cause, by his attorneys, and moves the court for judgment in said cause, in accordance with the prayer of the complaint in said cause, and also for judgment upon the attachment proceedings therein.

CHARLES A. SPIESS AND
S. B. DAVIS, JR.,
Las Vegas, N. M., Attorneys for Plaintiff.

(Endorsed:) Motion for Judgment. Filed in my office Aug. 22nd, 1906. Secundino Romero, Clerk.

And afterwards to wit, on September 17th, 1908, there was filed in said clerk's office, sheriff's return of service of intervening petition with exhibits, order and notice, on Charles Springer, August 18th, 1906, which said sheriff's return is in words and figures as follows, to wit:

62 TERRITORY OF NEW MEXICO:

In the Fourth Judicial District Court in and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

Sheriff's Return of Service.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

I, the undersigned, Marion Littrell, Sheriff in and for Colfax County, Territory of New Mexico, do hereby certify that I have served the intervening petition, in the above entitled cause of Frank H. Jones, as Trustee of The Oro Dredging Company, bankrupt, together with four Exhibits, A, B, C and D, an order of the court permitting such intervention, and a notice that the same had been filed with the clerk of the said court in this cause,—copies of which are hereto attached, upon Charles Springer, and that such service was made in the County of Colfax and Territory of New Mexico, on the 18th day of August, A. D. 1906, by giving to and leaving with him personally the said Charles Springer, a copy thereof.

MARION LITTRELL,
Sheriff in and for Colfax County,
Territory of New Mexico.

Sheriff's fees, $1.50 paid.

Attached to said Sheriff's return, was a carbon copy of the intervening petition as above set forth, and also carbon copies of Exhibits A, B, C, D, as above set forth, and also an order of court and notice as follows:

63 *Notice.*

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court for the Fourth Judicial District, Territory of New Mexico, Sitting within and for the County of Colfax.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

You are hereby notified that pursuant to an order made and entered in the above entitled cause, on the 4th day of August, 1906, by the Hon. William J. Mills, Chief Justice of the Supreme Court of

the Territory of New Mexico, and Judge of the Fourth Judicial District Court, thereof, sitting in chambers, in the City of Las Vegas, and within the said District, leave was granted to Frank H. Jones, as Trustee of the Oro Dredging Company, a bankrupt, to file his intervening petition instanter in the above entitled cause, and that said intervening petition was duly filed herein on said date, copies of which said order and of which said intervening petition are hereto attached and are herewith served upon you.

SCOTT, BANCROFT, LORD & STEPHENS,
No. 184 La Salle St., Chicago, Ill.,
ELMER E. STUDLEY,
Raton, N. M.,
Attorneys for Frank H. Jones, as Trustee of the Oro Dredging Company, a Bankrupt.

64 To James K. Hunt, heretofore appointed as receiver herein; and
To Charles Springer; and to
William C. Wrigley, as attorney for James K. Hunt as such receiver.

Order of Court.

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court for the Fourth Judicial District, Territory of New Mexico, Sitting within and for the County of Colfax.

No. 2720.

B. J. YOUNG, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

On motion of Frank H. Jones, as trustee of The Oro Dredging Company, a Bankrupt, for leave to file an intervening petition herein, Elmer E. Studley, and Scott, Bancroft, Lord & Stephens appearing for said trustee, and Stephen B. Davis, Jr., appearing for the plaintiff, and objecting to the hearing of said motion for want of five days' notice.

And the court having heard arguments of counsel and being duly advised in the premises:

It is ordered, adjudged and decreed by the court that leave be and the same is hereby given to said Frank H. Jones, as trustee of The Oro Dredging Company, a bankrupt, to file his intervening petition herein instanter, without prejudice to any right of the said
65 plaintiff to move to strike said petition from the files.

And the plaintiff by his attorneys excepts to the ruling of the court granting said leave, for want of five days' notice.

WILLIAM J. MILLS,
Chief Justice, etc.

Done in Chambers at Las Vegas, this August 4th, 1906.

(Endorsed:) Sheriff's return of service of intervening petition, with exhibits, order and notice on Charles Springer, Aug. 18th, 1906. Filed in my office this Sep. 17th, 1906. Secundino Romero, Clerk.

And afterwards, to wit, on September 22nd, 1906, there was filed in said clerk's office an amended intervening petition of Frank H. Jones, Trustee, which said amended intervening petition is in words and figures as follow*ings*, to wit:

66 TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting within and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

Amended Intervening Petition of Frank H. Jones, as Trustee of The Oro Dredging Company, a Bankrupt.

To the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District thereof, sitting within and for the County of Colfax:

Your petitioner, Frank H. Jones, of the City of Chicago, County of Cook, and State of Illinois, as trustee of The Oro Dredging Company, a bankrupt, pursuant to the order of Court heretofore entered herein, files this his Amended Intervening Petition in the above entitled cause; and thereupon your petitioner shows and represents to the court as follows:

1. That he is the duly appointed and qualified trustee in bankruptcy of The Oro Dredging Company, a corporation organized under the laws of the State of Illinois, and that the said corporation for the greater portion of six months next preceding the 12th day of March, 1906, had its principal place of business at the
67 City of Chicago, in the County of Cook and State of Illinois, and in the Eastern Division of the Northern District of Illinois; and that during said period said corporation had been, and upon the said 12th day of March A. D. 1906, was, engaged principally in mining and mercantile pursuits.

2. Your petitioner further represents that on or about the 12th day of March, A. D. 1906, a petition in bankruptcy was filed in the District Court of the United States for the Eastern Division of the Northern District of Illinois, by Irving Usner, The Bucyrus Company, a corporation, and Clara C. Cramer, against the above named The Oro Dredging Company, bearing general number 13,242, and praying that the said The Oro Dredging Company be adudged a

bankrupt within the purview of the Acts of Congress relating to bankruptcy, and that the said Irving Usner, The Bucyrus Company, a corporation, and Clara C. Cramer were, at the date of the filing of said petition, creditors of said The Oro Dredging Company, having provable claims, amounting in the aggregate in excess of securities held by them, to the sum of $500, and that the said The Oro Dredging Company then owed debts to the amount of $1,000.

3. And your petitioner further represents that on, to-wit, the 5th day of April, A. D. 1906, the said The Oro Dredging Company entered its appearance in said bankruptcy proceedings and that thereafter such proceedings were had upon said petition that the said The Oro Dredging Company was, on or about the 23d day of April, 1906, by an order duly entered in said bankruptcy proceedings by the said United States District Court, duly adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy.

68 4. That thereafter, Frank H. Jones, was, by an order duly entered in said bankruptcy proceedings, appointed trustee of said The Oro Dredging Company, a bankrupt; and on or about the 16th day of July, A. D. 1906, he duly qualified as such trustee by filing his bond as required by said Court, and that said bond was, on or about the 16th day of July, A. D. 1906, by an order that day entered in said proceedings, duly approved by said court.

5. Your petitioner further represents that on or about June 26th, 1906, schedules were filed in the said bankruptcy proceedings, showing claims against said estate amounting to $15,000, and in which schedules the plaintiff in the above entitled cause, J. van Houten, was scheduled as a creditor of said estate for the amount of $5,168.89.

6. That at the date of the filing of said petition in bankruptcy and at the date of the adjudication of bankruptcy thereon, as above set forth, the said bankrupt, The Oro Dredging Company, was the owner of the following described property, situated in the County of Colfax, in the Territory of New Mexico, (which comprised all the assets of said estate, as your petitioner is advised, excepting the sum of $82.49), to wit:

All that tract of land lying in the Moreno Valley within the Beaubien and Miranda or Maxwell Land Grants as surveyed by L. S. Preston, surveyor to the Maxwell Land Grant Co., October, 1900, survey No. 275;

Beginning at the northeast corner No. 1, at the southeast corner of the tract of land heretofore sold to Herman Mutz, in section 30, township 28 north, range 16 *each* of the New Mexico Meridian.

Set a pine post 6 inches by 6 inches by 4 feet, 2 feet in the 69 ground, and mark "1 /275" whence the corner to sections 20, 31, 25 and 36, township 28 north, ranges 15 and 16 east, bears south 65 degrees, 32 minutes, west 3241 feet distant; the southeast corner of block No. 6, Elizabethtown, bears south 22 degrees, 00 minutes, 13 seconds west 2930.32/100 feet distant to a "point of rocks" above Elizabethtown, bears south 18 degrees, 53 minutes

west, 2344 feet distant; thence south 7 degrees, 35 minutes, 41 seconds west.

3,874.00 feet intersect line 4-1 of survey 252 Confidence Mill Site at 192 feet east of corner 4/252,

4,380.00 feet intersect line 2/3 of survey 252 at 121 feet east of corner 3½252,

4,534.00 feet to corner No. 2 identical with corner No. 4 of survey 220, Klondyke, marked "2/275" also marked "4/220" and "M x 1/220," whence the southeast corner of Elizabethown bears north 58 degrees, 15 minutes, 20 seconds west 536.12 feet distant. Thence south 5 degrees, 43 minutes east.

726.00 feet to corner No. 3 a pine post 6 inches by 6 inches by 4 feet set 2 feet in the ground and marked "3/275" thence south 49 degrees and 33 minutes east.

3,140.00 feet to corner No. 4 a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "4/275."

2,650.00 feet to corner No. 5, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "5/275"; thence south 13 degrees 55 minutes east.

3,300.00 feet to corner No. 6, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "6/275." Thence south 5 degrees and 55 minutes east.

70 1,180.00 feet to the southeast corner No. 7, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "7/275" S. E. Corner," whence the northeast corner of J. Scully's tract bears south 89 degrees and 5 minutes west 325 feet distant. Thence south 89 degrees and 5 minutes west.

750.00 feet to the southeast corner No. 8, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "8/275 S. W. Corner." Thence north 5 degrees and 6 minutes west.

1,512.00 feet to corner No. 9, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "9/275." Thence north 17 degrees, 15 minutes west.

2,750.00 feet to corner No. 10, a pine post 6 inches by 6 inches, by 4 ft. set 2 feet in the ground and marked "10.275." Thence north 10 degrees 15 minutes west.

1,300.00 feet to corner No. 11, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "11/275"; thence north 34 degrees and 53 minutes west.

1,800.00 feet to corner No. 12, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "12/275." Thence north 70 degrees and 20 minutes west.

1,300.00 feet to the corner No. 13, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "13/275." thence north 39 degrees, 28 minutes west.

1,570.00 feet to corner No. 14, a pine post 6 inches by 6 inches, by 4 feet, set 2 feet in the ground and marked "14/275." Thence north 2 degrees 50 minutes west.

71 1,320.00 feet to corner No. 15, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "15/275"; thence north 88 degrees, 32 minutes east.

4 feet, set 2 feet in the ground and marked "16/275"; whence the 180.00 feet to corner No. 16, a pine post 6 inches by 6 inches by southeast corner of block No. 1, Elizabethtown, bears south 88 degrees, 32 minutes west, 60 feet distant. Thence north 1 degree, 28 minutes west.

1,500.00 feet to corner No. 17, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "17/275"; whence the southeast corner of block 6 Elizabethtown bears south 88 degrees 32 minutes west, 60 feet distant; thence north 34 degrees, 32 minutes east.

322.00 feet to corner No. 18, a pine post 5 inches by 5 inches by 4 feet, set 2 feet in the ground and marked "18/275"; thence north 17 degrees, 18 minutes west.

1,253.00 feet to corner 19, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "19½275"; thence north 18 degrees, 30 minutes east.

1,318.00 feet to northwest corner No. 20, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "20/275" N. E. Corner"; thence north 89 degrees, 30 minutes east.

806.00 feet to northeast corner No. — the point of beginning.

A total area of 260.52 acres, less conflict with survey 252, Confidence Mill Site, 1.79 acres. A net area of 258.73 acres. Containing in all 258.73 acres of land, more or less.

And also the following property:

1 Mining Dredge situated upon the property herein above described,

1 Scow attached to said dredge,

72 1 Wood Boat,

1 Skiff,

— Buckets,

— Cables,

1 Windmill, Pump and Tank,

1 Office and its contents,

1 Barn,

12 cords of Wood,

1 Machine Shop containing tools of various kinds,

1 Gasoline Engine,

1 Drill Press,

1 barrel full of Oil,

2 barrels, each about onehalf full of Oil,

Stock and Dies,

Various small Tools,

1 large Pipe Cutter,

Lumber,

5 barrels Coal,

Pipe and steel Rods of various sizes,

1 Blacksmith's Shop with Buffalo forge, anvil and vise, and various hammers and tongs,

1 Studebaker Wagon,

1 team Horses branded F on left hip,

1 three-seated buggy,

1 set double Harness,
Furniture,
1 roll-top Writing Desk,
11 Chairs,
1 Centre Stand,
1 Bedstead,
1 Coat,
1 Refrigerator,
2 Carpets,
Various Dishes,

73 And generally all tools and implements of every description in or near the machine shop and office lately used by the said The Oro Dredging Company, and all the furniture in the house lately used by H. H. Argue.

7. Your petitioner represents that by virtue of the Acts of Congress relating to bankruptcy, and particularly of Section 70 of said Act, upon his appointment and qualification as such trustee as aforesaid, your petitioner became, by operation of law, vested with the title of The Oro Dredging Company as of the date upon which it was adjudicated a bankrupt, to-wit, April 23d, 1906, to the property of said bankrupt hereinabove described.

8. Your petitioner further represents that on or about the 23d day of February, 1906, one J. van Houten, who is plaintiff in the above entitled suit, sued out a writ of attachment in the District Court of the Fourth Judicial District of the Territory of New Mexico sitting within and for the County of Colfax, in the above entitled suit of J. Van Houten vs. The Oro Dredging Company, and bearing No. 2702 in said court; and that said writ of attachment was levied upon the property of said The Oro Dredging Company hereinabove described, on or about the 27th day of February, A. D. 1906, and was returned to this court on the 27th day of February, A. D. 1906; but your petitioner avers that no personal service of process upon said defendant, The Oro Dredging Company, has been had in said case, and that no appearance has been entered by the said defendants therein.

9. Your petitioner further represents that at the date of the bringing of the said suit, the said defendant, The Oro Dredging Company, was, and for some time prior thereto had been, in-

74 solvent.

10. Your petitioner further represents that by virtue of the Acts of Congress relating to bankruptcy, and particularly by virtue of Section 67*f* of said acts, upon the adjudication of bankruptcy of the said The Oro Dredging Company as aforesaid, the lien of the attachment in the above mentioned case, if any accrued thereby, became, and is, null and void; and the property affected by said attachment passed to your petitioner as such trustee, wholly released and discharged from the same; and that your petitioner now is, and ever since his appointment and qualification as trustee as aforesaid, has been entitled to the possession and control thereof as a part of the assets of said bankrupt estate, free and clear from the lien of said attachment, for the purpose of administering the

same under the direction of the District Court of the United States for the Eastern Division of the Northern District of Illinois, for the benefit of the creditors of said estate, including the complainant in this suit, and that by virtue of the bankruptcy proceedings as above set forth, the said District Court of the United States for the Eastern Division of the Northern District of Illinois, became entitled to exclusive jurisdiction over the property of said bankrupt hereinabove described, for the purpose of administering the same in accordance with the Acts of Congress relating to bankruptcy.

11. Your petitioner further represents that on or about the 9th day of March, A. D. 1906, an order was entered in the above entitled case, appointing James K. Hunt as special receiver of the mining dredge above mentioned, upon which said writ of attachment was levied.

12. Your petitioner further represents that on or about
75 the 1st day of May, 1906, an order was entered in the above entitled cause, directing the said James K. Hunt as special receiver to sell the said dredge, and that the said James K. Hunt claims that, pursuant to said order, he did, on or about the 26th day of June, 1906, sell said dredge to one Charles Springer, of the County of Colfax and Territory of New Mexico, for the sum of $5,000, and that thereafter an order was entered herein purporting to approve said alleged sale; but your petitioner further represents that at the time of said alleged sale the said plaintiff, J. van Houten, the said receiver, James K. Hunt, and the said Charles Springer, and each of them, had notice of the pendency of said bankruptcy proceedings, and reasonable cause for inquiry; that the said dredge was worth upwards of the sum of $10,000, and that the price at which said dredge is claimed to have been sold is grossly inadequate, and the said Charles Springer was not a bona fide purchaser of said dredge for value.

13. Your petitioner further represents that the said dredge is a ponderous piece of machinery, of wood and iron, and is not perishable property within the meaning of the statute of the Territory of New Mexico relating to the sale of perishable property before judgment, but is practically indestructible, and that at the time of said alleged sale thereof no judgment had been entered in said attachment suit, and that this court had no jurisdiction to order the sale of said property before the entry of judgment in said case; and that said order was improvidently entered and conferred no lawful authority upon the said James K. Hunt to sell said dredge, and that said alleged sale was null and void, and no title passed thereby to said Charles Springer.

14. Your petitioner further represents that the said order
76 of May 1, 1906, authorizing the said alleged sale, and the order approving the same, should be set aside and vacated, and that said attachment should be dissolved and the possession of said dredge and all property attached in the above entitled case, turned over to your petitioner, Frank H. Jones, as trustee of the said The Oro Dredging Company.

15. Your petitioner therefore prays that the said order of May 1st,

1906, ordering the sale of said dredge, the said alleged sale and said order approving the same, may be set aside and vacated, and that the attachment herein be dissolved, and the property affected thereby turned over to your petitioner as trustee of the said The Oro Dredging Company; and your petitioner prays for such other and further or different relief as to the court shall seem meet and proper.

FRANK H. JONES,
As Trustee of The Oro Dredging Company.
By SCOTT, BANCROFT, LORD & STEPHENS,
His Attorneys.

SCOTT, BANCROFT, LORD & STEPHENS,
Room 500, 184 La Salle St., Chicago, Illinois.
ELMER E. STUDLEY, *Raton, New Mexico,*
Attorneys for said Petitioner.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

Elmer E. Studley, being first duly sworn according to law, deposes and says that he is one of the attorneys for the petitioner in the above mentioned petition, and as such attorney makes this affidavit for and on behalf of said petitioner; that he has read the above and foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein alleged to be stated upon information and belief, and as to those matters he believes it to be true; and that the reason why this petition is not verified by the oath of said petitioner is because the said petitioner is not within the County of Colfax, in the Territory of New Mexico, and is unable to sign this petition and make the necessary affidavit, being without the Fourth Judicial District of the Territory of New Mexico.

77

ELMER E. STUDLEY.

Subscribed and sworn to before me this 21st day of September, 1906. Notary Public for Colfax County, Territory of New Mexico.
[SEAL.]
EDITH WILEMAN,
Notary Public.

(Endorsements:) 2702. Territory of New Mexico, County of Colfax, Fourth Judicial District Court. J. van Houten, plaintiff, vs. The Oro Dredging Company, defendant. Amended Intervening Petition of Frank H. Jones, Trustee. Filed in my office Sept. 22, 1906. Secundino Romero, Clerk. Elmer E. Studley, Att'y, Raton, N. M. Scott, Bancroft, Lord & Stephens, Chicago, Ill., attorneys for trustee.

And afterwards, to-wit, on September 27th, 1906, there was filed in said clerk's office sheriff's return of service of amended intervening petition and notice on Charles Springer, in words and figures as follows, to-wit:

78 TERRITORY OF NEW MEXICO:

In the Fourth Judicial District Court in and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

Sheriff's Return of Service.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

I, the undersigned, Marion Littrell, sheriff in and for Colfax County and Territory of New Mexico, do hereby certify that I have served the Amended Intervening Petition in the above entitled cause, of Frank H. Jones as trustee of The Oro Dredging Company, a bankrupt, together with a notice that the same had been filed with the clerk of the court in this cause, copies of which are hereto attached, upon Charles Springer, and that service was made in the City of Raton, County of Colfax and Territory of New Mexico on the 26th day of September, A. D. 1905, by giving to and leaving with him personally, the said Charles Springer, a true copy thereof.

MARION LITTRELL,
Sheriff of Colfax County, Territory of New Mexico.

Sheriff's fees $1.50—Paid.

79 TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting Within and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

Notice.

You will please take notice that an Amended Intervening Petition has been filed with the clerk of the above named District Court in the above entitled cause, a copy of which is hereto attached and herewith served upon you.

SCOTT, BANCROFT, LORD & STEPHENS,
184 *La Salle St., Chicago, Ill.,*
ELMER E. STUDLEY,
Raton, New Mexico,
Attorneys for Frank H. Jones, as Trustee of The Oro Dredging Company, a Bankrupt.

To Charles Springer.

80 TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting Within and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

Amended Intervening Petition of Frank H. Jones, as Trustee of the Oro Dredging Company, a Bankrupt.

To the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District thereof, Sitting within and for the County of Colfax:

Your petitioner, Frank H. Jones, of the City of Chicago, County of Cook and State of Illinois, as trustee of The Oro Dredging Company, a bankrupt, pursuant to the order of court heretofore entered herein, files this his Amended Intervening Petition in the above entitled cause; and thereupon your petitioner shows and represents to the court as follows:

1. That he is the duly appointed and qualified trustee in bankruptcy of The Oro Dredging Company, a corporation organized under the laws of the State of Illinois, and that the said corporation for the greater portion of six months next preceding the 12th day of March, 1906, had its principal place of business at the City
81 of Chicago, in the County of Cook and State of Illinois, and in the Eastern Division of the Northern District of Illinois; and that during said period said corporation had been, and upon the said 12th day of March, A. D. 1906, was, engaged principally in mining and mercantile pursuits.

2. Your petitioner further represents that on or about the 12th day of March, A. D. 1906, a petition in bankruptcy was filed in the District Court of the United States for the Eastern Division of the Northern District of Illinois, by Irving Usner, The Bucyrus Company, a corporation, and Clara C. Cramer, against the above named The Oro Dredging Company, bearing general number 13242, and praying that the said The Oro Dredging Company be adjudged a bankrupt within the purview of the Acts of Congress relating to bankruptcy, and that the said Irving Usner, The Bucyrus Company, a corporation, and Clara C. Cramer, were, at the date of the filing of said petition, creditors of said The Oro Dredging Company, having probable claims, amounting in the aggregate in excess of securities held by them, to the sum of $500, and that the said The Oro Dredging Company then owed debts to the amount of $1,000.

3. And your petitioner further represents that on to-wit, the 5th

day of April, A. D. 1906, the said The Oro Dredging Company entered its appearance in said bankruptcy proceedings and that thereafter such proceedings were had upon said petition that the said The Oro Dredging Company was, on or about the 23d day of April, 1906, by an order duly entered in said bankruptcy proceedings by the said United States District Court, duly adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy.

4. That thereafter, and on to-wit, the 9th day of July,
82 1906, your petitioner, Frank H. Jones, was, by an order duly entered in said bankruptcy proceedings, appointed trustee of said The Oro Dredging Company, a bankrupt; and on or about the 16th day of July, A. D. 1906, he duly qualified as such trustee by filing his bond as required by said court, and that said bond was, on or about the 16th day of July, A. D. 1906, by an order that day entered in said proceedings, duly approved by said court.

5. Your petitioner further represents that on or about June 26th, 1906, schedules were filed in the said bankruptcy proceedings, showing claims against said estate amounting to $15,000, and in which schedules the plaintiff in the above entitled cause, J. van Houten, was scheduled as a creditor of said estate for the amount of $5,168.89.

6. That at the date of the filing of said petition in bankruptcy and at the date of the adjudication of bankruptcy thereon, as above set forth, the said bankrupt, The Oro Dredging Company, was the owner of the following described property, situated in the County of Colfax, in the Territory of New Mexico (which comprised all the assets of said estate, as your petitioner is advised, excepting the sum of $82.49), to-wit:

All that tract of land lying in the Mereno Valley within the Beaubien and Miranda or Maxwell Land Grants, as surveyed by L. S. Preston, surveyor to the Maxwell Land Grant Co., October, 1900, Survey No. 275:

Beginning at the northeast corner No. 1, at the southeast corner of the tract of land heretofore sold to Herman Mutz, in section 30, township 28 north, range 16, east of the New Mexico Meridian. Set a pine post 6 inches by 6 inches by 4 feet, 2 feet in the ground,
and mark "1/275" whence the corner to sections 30, 31, 26
83 and 36, township 28 north, ranges 15 and 16 east, bears south 65 degrees, 32 minutes, west 3241 feet distant; the southeast corner of block No. 6, Elizabethtown, bears south 22 degrees, 00 minutes, 13 seconds, west 2930.32 100 feet distant to a "point of rocks" above Elizabethtown, bears south 18 degrees, 53 minutes west, 2344 feet distant; thence south 7 degrees, 35 minutes, 41 seconds west, 3,874.000 feet intersect line 4-1 of survey 252 Confidence Mill Site at 192 feet east of corner 1 252,

4,380.00 feet intersect line 2 3 of survey 252 at 121 feet east of corner 3 252,

4,534.00 feet to corner No. 2 identical with corner No. 4 of survey 220, Klondyke, marked "2/275" also marked "4/20" and "M x 1/220", whence the southeast corner of Elizabethtown bears north

58 degrees, 15 minutes, 20 seconds west 536.12 feet distant; thence south 5 degrees 43 minutes east.

726.00 feet to corner No. 3 a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "3/275"; thence south 49 degrees, 33 minutes east.

3,140.00 feet to corner No. 4, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "4/275."

2,650.00 feet to corner No. 5, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "5/275"; thence south 13 degrees, 55 minutes east.

3,300.00 feet to corner No. 6, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "6/275"; thence south 5 degrees and 55 minutes east.

1,180.00 feet to the southeast corner No. 7, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "7/275 S. E. Corner." Whence the northeast corner of J. Scully's
84 tract bears south 89 degrees and 5 minutes west 325 feet distant; thence south 89 degrees and 5 minutes west.

750.00 feet to the southeast corner No. 8, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground, and marked "8/275 S. W. Corner"; thence north 5 degrees 6 minutes west.

1,512.00 feet to corner No. 9, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "9/275"; thence north 17 degrees, 15 minutes west.

2,750.00 feet to corner No. 10, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground, and marked "10/275"; thence north 10 degrees, 15 minutes west.

1,300.00 feet to corner No. 11, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "11/275"; thence north 34 degrees and 53 minutes west.

1,800.00 feet to corner No. 12, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "12/275"; thence north 70 degrees and 20 minutes west.

1,300.00 feet to corner No. 13, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "13/275"; thence north 39 degrees, 28 minutes west.

1,570.00 feet to corner No. 14, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "14/275"; thence north 2 degrees 50 minutes west.

1,320.00 feet to corner No. 15, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "15/275"; thence north 88 degrees, 32 minutes east.

180.00 feet to corner No. 16, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "16/275"; whence the southeast corner of block No. 1, Elizabethtown, bears south 88 degrees, 32 minutes west, 60 feet distant; thence north 1 de-
85 gree, 28 minutes west.

1,500.00 feet to corner No. 17, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "17/275"; whence the southeast corner of block 6, Elizabethtown, bears south

86 degrees, 32 minutes west, 60 feet distant; thence north 34 degrees, 32 minutes east.

322.0 feet to corner No. 18, a pine post 5 inches by 5 inches by 4 feet, set 2 feet in the ground and marked "18/275"; thence north 17 degrees, 18 minutes west.

1,253.00 feet to corner No. 19, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "19/275"; thence north 18 degrees, 30 minutes east.

1,318.00 feet to northwest corner No. 20, a pine post 6 inches by 6 inches by 4 feet, set 2 feet in the ground and marked "20/275 N. E. Corner"; thence north 89 degrees, 30 minutes east.

806.00 feet to northeast corner No. — the point of beginning.

A total area of 260.52 acres, less conflict with survey 252, Confidence Mill site 1.79 acres, a net area of 258.73 acres, containing in all 258.73 acres of land, more or less.

And also the following property:

1 mining dredge situated upon the property hereinabove described,
1 scow attached to said dredge,
1 wood boat,
1 skiff,
— buckets,
— cables,
1 windmill, pump and tank,
1 office with its contents,
1 barn,
86 12 cords of wood,
1 machine shop containing tools of various kinds,
1 gasoline engine,
1 drill press,
1 barrel full of oil,
2 barrels, each about one-half full of oil,
Stocks and dies,
Various small tools,
1 large pipe cutter,
Lumber,
5 barrels coal,
Pipe and steel rods of various sizes,
1 Blacksmith's shop with Buffalo forge, anvil and vise and various hammers and tongs,
1 Studebaker wagon,
1 team of Horses, branded F on left hip,
1 three seated buggy,
1 set double harness,
Furniture,
1 roll-top writing desk,
11 chairs,
1 centre stand,
1 bedstead,
1 coat,
1 refrigerator,
2 carpets,
Various dishes,

And generally all tools and implements of every description in or near the machine shop and office lately used by the said The Oro Dredging Company, and all the furniture in the house lately occupied by H. H. Argue.

7. Your petitioner represents that by virtue of the Acts of Congress relating to bankruptcy, and particularly of Section 70 of said Act, upon his appointment and qualification as such trustee
87 as aforesaid, your petitioner became, by operation of law, vested with the title of The Oro Dredging Company as of the date upon which it was adjudicated a bankrupt, to-wit, April 23d, 1906, to the property of said bankrupt hereinabove described.

8. Your petitioner further represents that on or about the 23d day of February, 1906, one J. van Houten, who is plaintiff in the above entitled suit, sued out a writ of attachment in the District Court of the Fourth Judicial District of the Territory of New Mexico sitting within and for the County of Colfax, in the above entitled suit of J. van Houten vs. The Oro Dredging Company, and bearing No. 2702 in said court; and that said writ of attachment was levied upon the property of said The Oro Dredging Company hereinabove described, on or about the 27th day of February, A. D. 1906; but your petitioner avers that no personal service of process upon said defendant, The Oro Dredging Company, has been had in said case, and that no appearance has been entered by the said defendant therein.

9. Your petitioner further represents that at the date of the bringing of the said suit, the said defendant, The Oro Dredging Company, was and for some time prior thereto, had been insolvent.

10. Your petitioner further represents that by virtue of the Acts of Congress relating to bankruptcy, and particularly by virtue of Section 67*f* of said Acts, upon the adjudication of bankruptcy of the said The Oro Dredging Company as aforesaid, the lien of the attachment in the above mentioned case, if any accrued thereby, became, and is, null and void; and the property affected by said attachment passed to your petitioner as such trustee, wholly released and
88 discharged from the same; and that your petitioner now is, and ever since his appointment and qualification as trustee as aforesaid, has been, entitled to the possession and control thereof as a part of the assets of said bankrupt estate, free and clear from the lien of said attachment, for the purpose of administering the same under the direction of the District Court of the United States for the Eastern Division of the Northern District of Illinois, for the benefit of the creditors of said estate, including the complainant in this suit, and that by virtue of the bankruptcy proceedings above set forth, the said District Court of the United States for the Eastern Division of the Northern District of Illinois, became entitled to exclusive jurisdiction over the property of said bankrupt hereinabove described, for the purpose of administering the same in accordance with the Acts of Congress relating to bankruptcy.

11. Your petitioner further represents that on or about the 9th day of March, A. D. 1906, an order was entered in the above entitled case, appointing James K. Hunt as special receiver of the mining dredge above mentioned, upon which said writ of attachment was levied.

12. Your petitioner further represents that on or about the 1st day of May, 1906, an order was entered in the above entitled cause, directing the said James K. Hunt as special receiver, to sell the dredge, and that the said James K. Hunt claims that, pursuant to said order, he did, on or about the 26th day of June, 1906, sell said dredge to one Charles Springer of the County of Colfax, and Territory of New Mexico, for the sum of $5,000, and that thereafter an order was entered herein purporting to approve said alleged sale; but your petitioner further represents that at the time of said alleged sale, the said plaintiff, J. Van Houten, the said receiver,
89 James K. Hunt, and the said Charles Springer, and each of them, had notice of the pendency of said bankruptcy proceedings, and reasonable cause for inquiry; that the said dredge was worth upwards of the sum of $10,000, and that the price at which said dredge is claimed to have been sold is grossly inadequate, and the said Charles Springer was not a bona fide purchaser of said dredge for value.

13. Your petitioner further represents that the said dredge is a ponderous piece of machinery of wood and iron, and is not perishable property within the meaning of the statute of the Territory of New Mexico relating to the sale of perishable property before judgment, but is practically indestructible, and that at the time of said alleged sale thereof no judgment had been entered in said attachment suit, and that this court had no jurisdiction to order the sale of said property before the entry of judgment in said case; and that said order was improvidently entered and conferred no lawful authority upon the said James K. Hunt to sell said dredge, and that the said alleged sale was null and void, and no title passed thereby to said Springer.

14. Your petitioner further represents that the said order of May 1, 1906, authorizing the said alleged sale, and the order approving the same, should be set aside and vacated, and that said attachment should be dissolved and the possession of said dredge and all property attached in the above entitled case, turned over to your petitioner, Frank H. Jones, as trustee of the said The Oro Dredging Company, bankrupt.

15. Your petitioner therefore prays that the said order of May 1st, 1906, ordering the sale of said dredge, the said alleged
90 sale and said order approving the same, may be set aside and vacated, and that the attachment herein be dissolved, and the property affected thereby turned over to your petitioner as trustee of the said The Oro Dredging Company; and your petitioner prays for such other and further or different relief as to the court shall seem meet and proper.

FRANK H. JONES.
As Trustee of the Oro Dredging Company.
By SCOTT, BANCROFT, LORD & STEPHENS, *His Attorneys.*

SCOTT, BANCROFT, LORD & STEPHENS,
Room 500, 184 La Salle Street, Chicago Illinois.
ELMER E. STUDLEY,
Raton, New Mexico,
Attorneys for said Petitioner.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

Elmer E. Studley, being first duly sworn, according to law, deposes and says that he is one of the attorneys for the petitioner in the above mentioned petition, and as such attorney makes this affidavit for and on behalf of said petitioner; that he has read the above and foregoing petition and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters and things therein alleged to be stated upon information and belief, and as to those matters, he believes them to be true; and that the reason why this petition is not verified by the oath of said petitioner is because the said petitioner is not within the County of Colfax in the Territory of New Mexico, and is unable to sign this petition
91 and make the necessary affidavit, being without the Fourth Judicial District of the Territory of New Mexico.

ELMER E. STUDLEY.

Subscribed and sworn to before me this 21st day of September, 1906, Notary Public for Colfax County, Territory of New Mexico.

[SEAL.] EDITH WILEMAN,
Notary Public.

(Endorsements:) No. 2702. Territory of New Mexico, Fourth Judicial District Court, in and for Colfax County. J. van Houten, Plaintiff, vs. The Oro Dredging Company, Defendant. Sheriff's Return of Service of Amended Intervening Petition and Notice on Charles Springer. Filed in Open Court, Sept. 27, 1906. Secundino Romero, Clerk. Scott, Bancroft, Lord & Stephens, 184 La Salle Street, Chicago, Ill., and Elmer E. Studley, Raton, N. M., Attorneys for Frank H. Jones, as Trustee of The Oro Dredging Co., bankrupt.

And afterwards, to-wit, on October 6th, 1906, there was filed in said clerk's office a demurrer of plaintiff, which said demurrer is in words and figures as follows, to-wit:

92 District Court, Fourth Judicial District, Territory of New Mexico, County of Colfax.

J. VAN HOUTEN
vs.
Odo DREDGING CO.

Demurrer.

Comes now the plaintiff in the above entitled cause by Spiess & Davis, *their* attorneys, and demurs to the amended petition of intervention filed by Frank H. Jones, trustee of the Oro Dredging Company, alleged bankrupt, and for causes of demurrer says:

I. That the court has no jurisdiction over part of the subject

matter of the said petition, to-wit, the custody and control of a certain mining dredge mentioned in said petition.

II. That it does not appear by the said petition that the intervenor has the legal capacity to intervene.

III. That several causes of action have been improperly joined. That there is an improper join-er of parties.

IV. That the amended petition does not state facts sufficient to constitute a cause of intervention.

V. That the amended petition does not state facts sufficient to constitute a cause of intervention for the following reasons:

(*a*) Because said petition does not state facts showing the trustee to be the duly appointed and qualified trustee.

(*b*) Because said petition shows an attempted appointment of trustee by a referee not shown to have authority to act in the premises.

93 (*c*) Because by said petition the referee is shown on July 9th, to have adjourned his court until August 15, 1906, and then an attempt on July 16, 1906, and August 2nd, 1906, to enter other orders.

(*d*) Because said petition does not state facts showing that the debts due Irving Usner, the Bucyrus Co., a corporation, and Clara C. Cramer, were provable debts as required by the Bankruptcy Act, referred to in said petition.

(*e*) Because said petition does not state facts showing the amount due each of the alleged creditors who filed the alleged petition in bankruptcy.

(*f*) Because said petition does not state facts showing how and in what manner and by whom said Oro Dredging Company entered its appearance in the suit in bankruptcy against said Oro Dredging Company mentioned in said petition.

(*g*) Because said petition does not state what were the proceedings antecedent in the bankruptcy court by which said Oro Dredging Company was adjudicated a bankrupt.

(*h*) Because said petition does not state by whom the said intervenor was appointed trustee of said Oro Dredging Company.

(*i*) Because said petition does not state whether or not any order of Court was made appointing either of the referees referred to in the exhibits, appended to said petition.

(*j*) Because said petition does not show any order of Court appointing as referee Frank L. Wean, in place of Sidney C. Eastman, alleged to be the referee in the first instance.

CHAS. A. SPIESS &
S. B. DAVIS, JR.,
Att'ys for Plaintiff, Las Vegas, N. M.

94 Endorsements: No. 2702. Demurrer. J. Van Houten vs. Oro Dredging Company. In the District Court, Fourth Judicial District, Territory of New Mexico, County of Colfax. Filed in my office Oct. 6, 1906. Secundino Romero, Clerk. Spess & Davis, Attorneys.

And afterwards, to wit, on November 5th, 1906, there was filed in said clerk's office a notice of motion by defendant, to dismiss the demurrer filed by plaintiff, which said Notice of Motion, is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO:

In the Fourth Judicial District Court in and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff.
vs.
ORO DREDGING COMPANY, Defendant.

Attachment.

Notice of Motion.

You are hereby notified that on Friday, November 9, 1906, at the chambers of the Judge of the Fourth Judicial District, in the City of Las Vegas, County of San Miguel, Territory of New Mexico, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard: We, the undersigned, Scott, Bancroft, Lord & Stephens, and Elmer E. Studley, attorneys for and on behalf of Frank H. Jones, trustee in bankruptcy of the said Oro Dredging Company, a bankrupt, *we* will move the court to dismiss the demurrer hereto-
95 fore filed by the plaintiff to the Amended Intervening Petition in the above entitled cause.

SCOTT, BANCROFT, LORD & STEPHENS.
AND
ELMER E. STUDLEY,
Attorneys for Frank H. Jones, Trustee of the Oro Dredging Company, a Bankrupt.

To Stephen B. Davis and Charles Spiess, Attorneys for Plaintiff.

Endorsements: No. 2702. District Court Colfax Co., J. Van Houten vs. Oro Co. Motion. Filed in my office Nov. 5, 1906, Secundino Romero, Clerk.

And afterwards, to wit, on February 9th, 1907, there was filed in said clerk's office an Order of the court overruling the demurrer to the amended intervening petition, which said order of the court is in words and figures as follows to wit:

County of Colfax,
Territory of New Mexico:

In the District Court, Fourth Judicial District.

No. 2702.

J. Van Houten, Plaintiff,
vs.
The Oro Dredging Company, Defendant.

Order Overruling Demurrer to Amended Intervening Petition.

This cause coming on to be heard upon the demurrer filed by plaintiff to the amended plea of intervention filed in said
96 cause by Frank H. Jones, Esq., as Trustee of The Oro Dredging Company, a bankrupt, and the court having duly considered the briefs filed by Counsel in support of and against the said demurrer, argument being waived by counsel, and the court being fully advised in the premises, does hereby order, adjudge and decree that said demurrer be and the same hereby is overruled; and the court does further order that the plaintiff have thirty days from the date hereof in which to answer or plead further to said amended intervening petition.

Las Vegas, N. M., February 9th, 1907.

WILLIAM J. MILLS,
Chief Justice, etc.

Endorsements: No. 2702. District Court Colfax County. J. Van Houten, Plaintiff, vs. The Oro Dredging Company, Defendant. Order overruling demurrer to amended intervening petition. Filed in my office Feb. 9, 1907. Secundino Romero, Clerk. Ent. in R. "H" p. 444.

At a regular term of the District Court of the Fourth Judicial District of the Territory of New Mexico within and for the County of Colfax, in the Court House of said county, in the City of Raton, New Mexico, begun and held on the 4th Monday of September, the same being Monday, September 23rd, 1907, for the trial of causes arising under the laws of the Territory of New Mexico.

Present:

Hon. William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District Court thereof.

Hon. J. Leahy, District Attorney.
97 Hon. Marion Littrell, Sheriff of Colfax County.
Secundino Romero, Clerk of the District Court. By E. G. Twitty, Deputy.

And afterwards to wit, on Monday, October 7th, 1907, the same being the 13th day of said term of court, the following among other proceedings were had to-wit:

No. 2702.

J. VAN HOUTEN
vs.
ORO DREDGING COMPANY.

Attachment.

On motion of E. E. Studley Esq., it is ordered by the court that John MacLeish be admitted to practice in the above entitled case for trustee, intervenor.

And afterwards, to wit, on Wednesday, October 9th, 1907, the same being the 15th day of said term of court, the following among other proceedings were had, to wit:

No. 2702.

J. VAN HOUTEN
vs.
ORO DREDGING COMPANY.

Attachment.

Come now the parties in the above entitled cause by their respective counsel. By consent of counsel for defendant, leave is hereby given petitioner to withdraw petition of Charles Springer, heretofore filed.

Comes now the plaintiff by William C. Wrigley, Esq., his attorney and files answer to Charles Springer to Intervening petition.

98 In the District Court Sitting within and for the County of Colfax, in the Territory of New Mexico.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY, Defendant.

Answer of Charles Springer to the Amended Petition of Frank H. Jones, Trustee.

Charles Springer for answer to the amended intervening petition herein filed states:

(1) That he has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of the Amended Intervening Petition herein are true or false.

(2) That he denies all of the allegations contained in paragraph 7 of the amended petition of intervention herein.

(3) That he admits all of the allegations contained in the 8th paragraph of the amended *intervention* petition herein except the last allegation in said paragraph 8, contained, where it is alleged that no appearance has been entered by the said defendant therein, and as to such allegation he denies the same.

(4) That he has no knowledge or information sufficient to form a belief as to whether the allegations contained in paragraph 9 of the amended *intervention* petition herein are true or false.

(5) That he admits all of the allegations contained in paragraph 11 of the Amended *intervention* petition herein.

(6) That he admits all of the allegations of paragraph 12 of the amended intervening petition herein included within the lines from 1 to 9 inclusive, and ending with a semi-colon, in said line 9 of said paragraph 12.

That he denies that he the said Charles Springer had notice of the pendency of said bankruptcy proceedings and denies that he had reasonable cause or any other cause whatsoever for enquiry—that he denies that said dredge was worth upwards of the sum of ten thousand dollars, and denies that the price at which said dredge was sold to him is grossly or otherwise inadequate or that the same was at all inadequate and denies that he the said Charles Springer was not a bona fide purchaser of said dredge for value.

(7) That he denies all of the allegations of paragraph 13, of the amended intervening petition herein.

II.

And for a further and affirmative defense herein, the said Charles Springer states:

(1) That certain writs of attachment were issued in the above entitled cause, and in the cause of H. J. Reiling vs. The Oro Dredging Company, No. 2703, pending in the District Court of the said County of Colfax and Territory of New Mexico.

(2) That said writs of attachment were on the 27th day of February, A. D. 1906, by the sheriff of Colfax County regularly levied upon the property of the Oro Dredging Company, described in the amended intervening petition herein and by virtue of said writs of attachment the said sheriff on the 27th day of February, A. D. 1906, seized the said property of the Oro Dredging Company, including the said mining dredge.

(3) That on the 19th day of March, A. D. 1906, the District Court of Colfax County by an order entered in the above entitled cause, appointed James K. Hunt, Special Receiver, to hold and conserve the aforesaid mining dredge.

(4) That on the 1st day of May, A. D. 1906, the District Court of said Colfax County made and entered an order in the above entitled cause, as follows, to wit:

"Now, towit:—this 1st day of May, 1906, the above entitled cause coming on for hearing on motion of William C. Wrigley, appearing for plaintiff, for an order directing the Honorable James K. Hunt, Receiver of a certain mining dredge located on the Merino Creek, in Colfax County, Territory of New Mexico, attached under and by virtue of a writ of attachment issued in the above entitled suit, to sell the same, and the court having considered the testimony heretofore produced before him on the application for the appointment of a Receiver, and the further testimony of Wm. C. Wrigley, Esq., attorney for plaintiff, in the suit of H. J. Reiling vs. Oro Dredging Company, brought in this court, and finding that it is expensive to protect and conserve same dredge, and that same is deteriorating in value and that the best interest of the defendant, Oro Dredging Company, as well as of creditors, and all parties in the same, are best protected by the speedy sale of said dredge, and it further appearing that although due publication has been made according to law of the pendency of said suit, no appearance has been entered for the defendant, it is hereby ordered that the said receiver, James K. Hunt, Esq., be and he is hereby directed to sell said dredge
[91] at public auction in the City of Raton, at the front door of the court house, after 30 days' notice of the time and place of sale, to the highest bidder, for cash, and the said receiver is hereby directed to report to the court his proceedings in this behalf and await such further orders as may be made in the premises. The notice aforesaid is to be given by publication once a week for four consecutive weeks in the Raton Range, a newspaper published in the said city of Raton.

WILLIAM J. MILLS,
Chief Justice, etc."

(5) That pursuant to said order the said James K. Hunt, Receiver, caused to be published in the Raton Range, a paper published in Colfax County, New Mexico, the following notice, to wit:

"Sale."

Receiver's Sale of Mining Dredge.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court for the Fourth Judicial District.

H. J. REILING
vs.
ORO DREDGING COMPANY.

J. VAN HOUTEN
vs.
ORO DREDGING COMPANY.

Notice is hereby given that under and by virtue of the orders issued in above entitled cause; on the 26th day of June A. D. 1906,

at the front door of the court house in Raton, New Mexico, at the hour of 10 o'clock A. M., I will sell to the highest bidder for cash, the mining dredge located on the Merino Creek, in the western part of Colfax County, the property of The Oro Dredging Company. Said Dredge has a full equipment of machinery for dredging mining ground, and has been in operation at said Merino Creek
102 for three years. The dredge cost, altogether, with equipments, about one hundred thousand dollars.

May 26th, 1906.

JAMES K. HUNT, *Receiver.*"

(6) That thereafter, there was filed in this court and in the above entitled cause, and in the cause aforesaid, entitled H. J. Reiling vs. Oro Dredging Company, the affidavit of Orin A. Foster, Foreman of The Raton Range; which said affidavit, is in words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

Orrin A. Foster, being duly sworn, declares and says, that he is foreman of the Raton Range, a newspaper published and having a general circulation in the City of Raton, County of Colfax and Territory of New Mexico; that the publication, a copy of which is hereto attached, was published in said paper in the regular and entire issue of every number of the paper, during the period and time of publication, and that the notice was published in the newspaper proper, and not a supplement, for four weeks consecutively, the first publication being on the 26th day of May, 1906, and the last publication on the 16th of June, 1906."

ORRIN A. FOSTER, *Foreman.*

Sworn and subscribed to before me a Notary Public, in and for the County of Colfax and Territory of New Mexico, this 16th day of June, 1906.

WM. A. CHAPMAN,
Notary Public.

103 (7) That thereafter on the 26th day of June, A. D. 1906, at the hour of ten o'clock A. M. in pursuance of said public notice of sale, at the front door of the court house in the city of Raton, the said Charles Springer made a bid for said dredge and the equipment thereof, in the sum of five thousand dollars, and was declared to be the highest and best bidder for said dredge, and said James K. Hunt, Receiver as aforesaid, then and there sold said dredge and its equipment to him, the said Charles Springer for the sum of Five Thousand Dollars, in cash which your petitioner immediately paid over to the said Receiver, James K. Hunt, and said James K. Hunt, Receiver, thereupon executed and delivered to your petitioner a certificate of sale of said dredge; and he, the said Charles Springer took the same into his possession, and is still in possession thereof.

(8) That thereafter the said James K. Hunt, Receiver aforesaid, made his report to the District Court of said Colfax County, reporting all and singular the matters and things by him done and performed touching or concerning the sale of said mining dredge, together with its equipment.

(9) That thereafter, on the 17th day of July, A. D. 1906 this court, caused the following order to be entered in said causes, to wit:

"This cause coming on to be heard upon the final report of James K. Hunt, Esq., heretofore appointed receiver therein, and the court having considered the said report and being now fully advised and informed in the premises:

It is considered and adjudged by the court, that the said final report of the said Receiver, be and it is hereby in all respects approved and confirmed.

And it appearing to the court that the said Receiver has
104 duly accounted for all of the money and the property which has come into his hands by virtue of his said Receivership and that there are no further duties to be performed by him as such Receiver: It is therefore ordered by the court, that the said Receiver be and he is hereby discharged."

(10) That he the said Charles Springer prior to and at the time he purchased the said mining dredge as aforesaid, had no knowledge or notice that proceedings of any nature or character whatsoever had been commenced or were pending in Chicago, Illinois, or in any other place for the purpose of having the said Oro Dredging Company adjudged a bankrupt, and was not informed nor had any knowledge of the fact that such proceedings were had or were pending until about two months after his said purchase of said mining dredge and no facts had come to his knowledge at the time of or prior to his purchase of said mining dredge touching said proceedings commenced in the Federal District Court of the United States at Chicago, Illinois, wherein, the said Oro Dredging Company was adjudged a bankrupt.

Wherefore, he, the said Charles Springer prays said amended intervening petition be, as to him, dismissed, and that he go thereof hence without day.

CHARLES SPRINGER.

CHARLES A. SPIESS,
Attorney for Charles Springer.

COUNTY OF COLFAX,
Territory of New Mexico, ss:

Charles Springer, being first duly sworn, deposes and says: that he has read over the above answer by him signed: that he knows
105 and understands the contents thereof and that the same is true of his own knowledge.

CHARLES SPRINGER.

Subscribed and sworn to before me this 9th day of October, 1907.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

(Endorsed:) No. 2702. In the District Court, County of Colfax, Territory of New Mexico. J. van Houten, plaintiff, vs. The Oro Dredging Company, defendant. Answer of Charles Springer, etc., filed in open court Oct. 9th, 1907. Secundino Romero, clerk. C. A. Spiess, attorney for Charles Springer, E. Las Vegas, N. M.

And afterwards to-wit, on October 9th, 1907, there was filed in said clerk's office an order of the court, which said order of the court is in words and figures as follows, to-wit:

In the District Court of the Fourth Judicial District in and for the County of Colfax, Territory of New Mexico.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Order of Court.

This cause coming on to be heard in open court at the
106 Court House in the City of Raton, Colfax County, and Territory of New Mexico on the 9th day of October, 1907, and the petitioner, Charles Springer, being personally present and also represented by Chas. A. Spiess, his attorney, and Frank H. Jones, trustee of The Oro Dredging Company, a bankrupt, being represented by Elmer E. Studley, Esquire, and Scott, Bancroft & Stephens, his attorneys, upon motion of Charles A. Spiess, Esquire, and there being no opposition thereto.

It is hereby considered and ordered that the petition and motion of Charles Springer filed herein on the 21st day of September, 1907, praying for a confirmation of the sale of a certain mining dredge to him by the receiver James K. Hunt be and the same is hereby withdrawn.

(Endorsement:) No. 2702. In the District Court of the Fourth Judicial District, in and for the County of Colfax, Territory of New Mexico. J. van Houten, plaintiff, vs. The Oro Dredging Company, defendant. Order of Court. Filed in my office Oct. 9, 1907. Secundino Romero, Clerk.

And afterwards, to-wit, on October 9th, 1907, there was filed in said clerk's office a stipulation, which said stipulation is in words and figures as follows:—

107 In the District Court of the Fourth Judicial District, Sitting Within and for the County of Colfax, Territory of New Mexico.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

No. 2703.

H. J. REILING, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Stipulation.

Now That Whereas a certain amended intervening petition was filed herein by said Frank H. Jones, trustee of The Oro Dredging Company, a bankrupt, in said above entitled causes on the 22nd day of September, A. D. 1906, which amended intervening petition prays for an order in each of said above entitled causes vacating the order of sale hertofore made herein.

Whereas an answer was filed to said amended intervening petition by Charles Springer, the purchaser at said sale; and

Whereas said petitioner and said respondent desire to stipulate to the facts alleged in said petition and answer, and present the issue raised thereby to the court herein by stipulation of said facts and the records in said causes.

Now Therefore, it is hereby stipulated by and between
108 Frank H. Jones, trustee, as aforesaid, and Charles Springer, said respondent to said petition by their respective attorneys that:

I.

The hearing of said petition and answer may be had and heard upon the record in said above entitled causes, including all entries, orders, and rulings of record in the clerk's office, and all papers regularly filed in said above entitled causes with the clerk of the said court, any and all of which said entries, orders, rulings and papers filed may be used or introduced as evidence on said hearing by either party hereto, subject, however, to any objection which may be interposed or made by either party to their competency, together with the stipulation of facts herein contained, as follows:

II.

That on the 12th day of March, A. D. 1906, a petition in bankruptcy was filed in the District Court of the United States for the Eastern Division of the Northern District of Illinois against the said The Oro Dredging Company, and praying that it be adjudged

a bankrupt within the purview of the Act of Congress relating to bankruptcy, a true copy of which said petition is as follows:

UNITED STATES OF AMERICA, :
Northern District of Illinois, Eastern Division:

To the Honorable Judges of the District Court of the United States for said District and Division:

The petition of Irving Usner, of Chicago, Illinois, The Bucyrus Company, a corporation, of Milwaukee, Wisconsin, and
109 Clara C. Cramer, of Chicago, Illinois, respectfully shows:

That the Oro Dredging Company is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois that such corporation has for the greater portion of six months next preceding the date of the filing of this petition, had its principal place of business at the City of Chicago, in the County of Cook, in the State, Division and District aforesaid, and owes debts to the amount of one thousand dollars ($1,000); that said corporation is principally and has during said period of six months been principally engaged in mining and mercantile pursuits.

That your petitioners are creditors of the said The Oro Dredging Company, a corporation as aforesaid, having provable claims in the aggregate, in excess of securities held by them, to the sum of five hundred dollars ($500); that the nature and amount of your petitioners' claim are as follows: The claim of your petitioner, Irving Usner, amounts to $1,750, and is for money heretofore loaned and advanced by said petitioner, Irving Usner, to said corporation, and is evidenced by the note of said corporation; the claim of your petitioner The Bucyrus Company amounts to $205, and is for goods, wares and merchandise heretofore sold and delivered to said The Oro Dredging Company at the latter's special instance and request; and the claim of Clara C. Cramer amounts to $25.00, and is for services rendered to said corporation, The Oro Dredging Company, at the latter's special instance and request, as stenographer and clerk.

And your petitioners further represent that said The Oro Dredging Company is insolvent and that within four months next pre-
110 ceding the date of this petition said The Oro Dredging Company committed divers acts of bankruptcy, to-wit: that said The Oro Dredging Company did heretofore, while insolvent, to wit: on December 20, 1905, pay to Duncan Moore, a creditor, the sum of, to-wit: $30.00 with intent to prefer such creditor over the other creditors of said The Oro Dredging Company, and did commit divers acts of bankruptcy in that it did within the period of four months heretofore pay to divers of its creditors, while it was insolvent as aforesaid, divers sums of money, with intent to prefer such creditors over the other creditors of said The Oro Dredging Company.

Wherefore, your petitioners pray that service of this petition, with a subpœna, may be made upon said The Oro Dredging Company, as provided in the Acts of Congress relating to bankruptcy, and that

it may be adjudged by this court to be a bankrupt within the purview of said acts.

IRVING USNER,
CLARA C. CRAMER,
THE BUCYRUS COMPANY,
By H. P. BELLS, *President*,
Petitioners.

SHOPE, MATHIS, ZANE AND WABER,
HOGAN & HOGAN,
Attorneys for Petitioners.

111 UNITED STATES OF AMERICA,
Eastern Division, Northern District of Illinois:

STATE OF ILLINOIS,
County of Cook, ss:

Irving Usner, being first duly sworn, on his oath says that he is one of the petitioners above named, and says that the statements contained in the foregoing petition subscribed by him are true.

IRVING USNER.

Subscribed and sworn to before me this 7th day of March, A. D. 1906.

[SEAL.] E. BENTLEY HAMILTON,
Notary Public.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

CUYAHOGA COUNTY,
State of Ohio, ss:

H. P. Eels, being first duly sworn, on his oath says that he is the duly authorized agent of The Bucyrus Company, and that the foregoing Petition by its subscribed is true.

H. P. EELS.

Subscribed and sworn to before me this 8th day of March, A. D. 1906.

[SEAL.] E. J. McGUIRE,
Notary Public.

112 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

STATE OF ILLINOIS,
County of Cook, ss:

Clara C. Cramer, being first duly sworn, on her oath states that she is one of the Petitioners above named, and says that the statements contained in the foregoing Petition subscribed by her are true.

CLARA C. CRAMER.

Subscribed and sworn to before me this 7th day of March, A. D. 1906.

[SEAL.] E. BENTLEY HAMILTON.
Notary Public.

(Endorsed:) 13242. In the District Court of the United States. In bankruptcy. In re The Oro Dredging Company. Filed Mar. 12, 1906, at 2:45 o'clock P. M. Nt. C. McMillan, Clerk. Hogan & Hogan, attorneys and counselors, Chicago.

III.

That thereafter such proceedings were had in said cause, that the said Oro Dredging Company was, on the 23d day of April, A. D. 1906, by said United States District Court duly adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, a true copy of which said order is as follows:

113 For the Northern District of Illinois.

Monday, April 23, A. D., 1906.

Present: The Honorable A. H. Bethea, Judge.

No. 13242.

In the Matter of THE ORO DREDGING COMPANY, Bankrupt.

At Chicago, in said district, on the twenty-third day of April, A. D., 1906, before the Honorable Solomon H. Bethea, Judge of said Court in Bankruptcy, the petition of Irving Usner, et al., that the said The Oro Dredging Company be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, The Oro Dredging Company is hereby declared and adjudged bankrupt accordingly.

Copy.

IV.

That thereafter on the 9th day of July, A. D. 1906, an order was entered by said Bankruptcy Court in said bankruptcy proceedings appointing Frank H. Jones trustee of the said The Oro Dredging Company, a bankrupt, true copy of which order is as follows:

In the District Court of the United States for the Northern District of Illinois.

No. 13242.

In the Matter of ORO DREDGING COMPANY, Bankrupt.

It appearing that Sidney C. Eastman, the referee to whom said cause is referred, is absent from said district, and

114 On this ninth day of July, A. D. 1906, this cause coming on for a first meeting of the creditors, and it appearing to the court that due notice of the first meeting of the creditors of the bankrupt has been given by mailing notice to all creditors named in the schedule at least ten days before this date, and by publication in the Chicago Legal News, the last publication being at least one week before this date, as required by law and the rule of this court. It is therefore ordered that a first meeting of the creditors of said bankrupt be held according to said notice.

Whereupon, Pursuant to said notice, the first meeting of creditors was held at Room 905 Monadnock Block, Chicago, Illinois, being the office of the referee, on the ninth day of July, A. D. 1906, at the hour of 10 A. M.

It is hereby ordered that all claims be allowed pro tempore; objections to be filed in 10 days; notice of filing objections to be served on claimant by mail or on local attorney at once.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in The Chicago Legal News, I, the undersigned referee of the said Court in Bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do appoint Frank H. Jones, as trustee of the same, with bond in the sum of $1,000.

Adjourned to August 15th, 1906, at 10 o'clock A. M

FRANK L. WEAN,
Referee in Bankruptcy.

115 V.

That thereafter, on the 16th day of July, A. D. 1906, said Frank H. Jones, trustee as aforesaid, filed his acceptance of such appointment together with his bond and duly qualified as such trustee; that an order was thereupon entered in said bankruptcy proceedings on the 16th day of July, A. D. 1906, approving said bond, a true copy of which said order is as follows:

Order Approving Trustee's Bond.

At a Court of Bankruptcy, Held in and for the Northern District of Illinois, at Chicago, this 16th Day of July, A. D. 1906, Before Sidney C. Eastman, Referee in Bankruptcy.

In the District Court of the United States for the Northern District of Illinois.

In Bankruptcy.

In the Matter of ORO DREDGING COMPANY, Bankrupt.

It appearing to the court that Frank H. Jones, of Chicago, and in said District, has been duly appointed trustee of the estate of the above bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the order of the court, to-wit, the sum of one thousand dollars, it is ordered that the said bond be and the same is hereby approved.

(Signed) SIDNEY C. EASTMAN,
Referee in Bankruptcy.

VI.

It is further stipulated that at the date of the filing of said petition in bankruptcy and at the date of the adjudication
116 of bankruptcy thereon, as above set forth, the said bankrupt, The Oro Dredging Company, was the owner of the said mining dredge levied upon in said above entitled causes, and also the owner of all other property described in the amended intervening petition of said trustee and levied upon under said attachment writs including said dredge subject to the lien of said attachment, if any such lien existed by virtue of the same.

Provided, however, that said trustee does not admit by this clause that any such lien did or does now exist by virtue of said writ of attachment.

VII.

That the order of May 1st, 1906, the notice of May 26, 1906, published by the said receiver, and the affidavit of publication thereon, the sale of said mining dredge on the 26th day of June, 1906, the filing and presentation of said report of said receiver, and the order approving said report of said receiver were each and all had subsequent to the filing of said petition in bankruptcy, and the entry of the order of adjudication thereon.

VIII.

That on June 22d, 1906, schedules were filed in said bankruptcy proceedings, in which said schedules H. J. Reiling, the plaintiff in said cause number 2703 was scheduled as a creditor in the sum of $8590.82, and J. van Houten, plaintiff in said cause number 2702 was scheduled as a creditor in the sum of $5188.89.

IX.

That the appearance of Frank H. Jones, trustee, as aforesaid, was first entered in said attachment suits on the 2d day
117 of August, A. D. 1905, by his written appearance on that day entered in said causes, and there had not been prior to said 2d day of August, A. D. 1906, any pleadings or papers of any description filed in the District Court of said Colfax County or before the Hon. William J. Mills, judge of said court, advising said court or the parties to the aforesaid attachment proceedings that there had been filed a petition in the Federal District Court of Illinois at Chicago, having for its purpose the securing of an order adjudging The Oro Dredging Company a bankrupt, or advising said court or judge thereof, or the said parties that the said Oro Dredging Company had been adjudged a bankrupt.

X.

It is further hereby stipulated that if Charles Springer were called as a witness in the hearing of said petition and answer, that he would testify that he purchased said mining dredge from James K. Hunt, receiver, at a public sale thereof, at which there were several bidders other than himself, that the amount he bid and paid therefor to said James K. Hunt was a fair and adequate price for said property at the date of sale; that he, the said Charles Springer, prior to and at the time he purchased the same had no knowledge or notice that proceedings of any nature or character whatsoever had been commenced at Chicago, Illinois, or any other place, to adjudge said Oro Dredging Company a bankrupt, and was not informed of the fact that such proceedings were had until two months after his said purchase.

That he, the said Charles Springer, would also testify that he had not notice of any kind or character prior to or at the
118 time of said purchase that said Oro Dredging Company was insolvent or that proceedings had been commenced or were pending which had for their purpose the securing of an order adjudging said Oro Dredging Company a bankrupt, and that said Charles Springer would also testify that since the said purchase and the taking possession of said property by him, he has paid out for the care, insurance, and repairs to said mining dredge, dams, ditches and headgate necessary to protect said property from floods and storms, the sum of $1544.90—and that said dredge has not been operated since the autumn of 1905, and that the same could not be safely operated without a considerable outlay for repairs.

All of which is subject to any objection made or to be made by said trustee on account of competency or otherwise, just as if said Charles Springer were testifying in person in open court.

XI.

The said mining dredge is a large boat constructed of wood, iron, and steel, equipped with machinery, tools and appliances for

dredging, elevating, washing, and extracting gold from placer dirt and gravel; that said boat is afloat upon an artificial lake or pond alongside of the Moreno river or creek, about half a mile from Elizabethtown in Colfax County, New Mexico; that the water to keep said pond at the proper level to float said dredge was obtained from a ditch leading from said creek, and the said dredge was operated by moving the same around upon said pond, and working a large number of iron and steel buckets weighing upwards of one thousand pounds each, attached to an endless chain revolving upon rollers on a large arm or crane built upon said dredge, from which
119 buckets elevated the dirt and gravel from the bottom and bank of said pond, dumping it into a large wood and iron hopper aboard said dredge, from which said dirt and gravel were carried by a stream of water through wood and iron sluice boxes extending to the rear of said dredge.

That said Moreno creek is a torrential stream in a mountain valley, subject to heavy floods from melting snows and rains in the high mountains adjacent to the valleys; that said pond upon which said dredge is floated is protected from floods which come down said stream and from the nearby hillsides by embankments and ditches which must be repaired and renewed from time to time when damaged by waters and debris; that said dredge since it stopped work in 1905 has been anchored by cables fastened to posts set in the ground on the shores of said pond; that said dredge was constructed in the year 1901 and used for about four years; that the materials, machinery, and equipment of said dredge were transported by wagon, over rough mountain roads from the nearest railway station, a distance of fifty-five miles.

ELMER E. STUDLEY,
SCOTT, BANCROFT & STEPHENS,
Attorneys for said Frank H. Jones, Trustee as Aforesaid.
CHARLES A. SPIESS,
Attorney for said Springer.

(Endorsements:) 2702. Territory of New Mexico, Fourth Judicial District Court, in and for Colfax County. J. van Houten, plaintiff, vs. The Oro Dredging Company, defendant. Stipulation. Filed in my office Oct. 9, 1907. Secundino Romero, Clerk. Elmer
120 E. Studley, and Scott, Bancroft & Stephens, Attorneys for Frank H. Jones, Trustee of The Oro Dredging Company, a bankrupt. Charles A. Spiess, attorney for Charles Springer.

And afterwards to-wit, on October 24th, 1907, there was filed in said clerk's office the replication of Frank H. Jones, trustee, the intervening petitioner, to the answer of Charles Springer, to the amended intervening petition of said Frank H. Jones, trustee, in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court of the Fourth Judicial District, in the Territory of New Mexico, Sitting within and for the County of Colfax.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

The Replication of Frank H. Jones, Trustee, the Intervening Petition Herein, to the Answer of Charles Springer, Filed to the Amended Intervening Petition of said Frank H. Jones, Trustee.

This Repliant, saving and reserving to himself now, and at all times thereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of said Charles Springer for replication
121 thereunto, says, that he will aver, maintain, and prove his said amended intervening petition to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this: that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays, as in and by his said amended intervening petition he has already prayed.

ELMER E. STUDLEY,
SCOTT, BANCROFT & STEPHENS,
Attorneys for said Frank H. Jones, Trustee.

(Endorsements:) 2702. In the District Court of the Fourth Judicial District in The Territory of N. M. J. van Houten vs. Oro Dredging Co. Replication to Answer of Charles Springer. Filed in my office Oct. 24, 1907. Secundino Romero, Clerk. Elmer E. Studley and Scott, Bancroft & Stephens.

And afterwards, to-wit, on Friday, November 8th, 1907, there was filed in said clerk's office a transcript of the record of a hearing held before Hon. Wm. J. Mills, Chief Justice, etc., on November 8th, 1907, which said transcript of record and testimony is in words and figures as follows, to-wit:

122 TERRITORY OF NEW MEXICO,
County of Colfax:

In the District Court, Fourth Judicial District.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
THE ORO DREDGING COMPANY.

No. 2720.

B. J. YOUNG, Plaintiff,
vs.
THE ORO DREDGING COMPANY.

Hearing Before Hon. William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District Court Thereof, Sitting within and for Colfax County, New Mexico, in Chambers at Las Vegas, on Friday, November 8th, 1907, at Two O'clock P. M. of said Day.

Appearances:

Mr. S. B. Davis, Jr., appears for Mr. J. van Houten, Mr. B. J. Young and Mr. Charles Springer.

Messrs. Scott, Bancroft and Stephens, represented by Mr. John E. McLeish, Mr. Elmer E. Studley, appear for and on behalf of Frank H. Jones, Trustee, and intervening petition herein.

Thereupon the following proceedings were had, to-wit:

Stipulation.

It is stipulated by and between the parties hereto by their respective counsel present, that the case of J. van Houten vs. The Oro Dredging Company, No. 2702, and the case of B. J. Young
123 vs. The Oro Dredging Company, No. 2720, as well as the amended intervening petition of the trustee and the answer for Charles Springer filed thereto in the case of J. van Houten vs. The Oro Dredging Company, and the amended intervening petition of Frank H. Jones, trustee of The Oro Dredging Company, a bankrupt, and the answer of Charles Springer filed to said amended intervening petition, and the replication of the trustee filed to said answer in the case of H. J. Reiling vs. The Oro Dredging Company, being No. 2703, be consolidated, and set for hearing on the 8th day of November, A. D. 1907, at the hour of two o'clock P. M. of said day.

It is further stipulated that a restraining order was heretofore entered in the United States District Court for the Northern District of

Illinois in the Eastern Division, in the matter of The Oro Dredging Company, a bankrupt, being No. 13,242 in bankruptcy, restraining and enjoining the said J. van Houten and the said B. J. Young from further prosecuting and said attachment suits above mentioned and consolidated, and from further interfering with the attempt of Frank H. Jones, trustee, in bankruptcy, from taking possession of the assets of said bankrupt.

Mr. McLEISH: That is correct, is it not, Mr. Davis.

Mr. DAVIS: Yes, sir.

Mr. McLEISH: Let the record so show.

Mr. McLEISH: Before Frank H. Jones, the intervening petitioner herein, introduces any evidence in support of the petition, I think it well to outline the case as it now stands before the court. I will say the three suits mentioned were writs of attachment issued in this court on or about the 23d day of February, 1906.

The attachment writs were levied on or about the
124 27th day of February of the same year, the property levied upon as shown by the return on the writ in each case is the identical property described in the intervening petition of the trustee in bankruptcy.

Following the levy of the attachment writs on the 12th day of March, 1906, a petition in bankruptcy was filed by three creditors in the United States District Court for the Northern District of Illinois, against the Oro Dredging Company, that company being the same company which is the defendant in the three attachment suits mentioned.

It was alleged in the petition in bankruptcy that The Oro Dredging Company was insolvent, and had committed divers acts of bankruptcy within four months from the date of the filing of the petition and sought to have the company adjudged a bankrupt in accordance with the United States Bankruptcy Act of 1898.

Following the filing of the petition in bankruptcy on the 19th day of March, A. D. 1906, an application was made in the case of J. van Houten, and the case of H. J. Reiling, for the appointment of a receiver, which application was made before this court. A receiver was sought for the purpose of protecting and preserving the ditch from certain alleged dangers that surrounded the dredge at that time, and Mr. James K. Hunt was appointed on the 19th day of March, 1906, being the same day the application was made.

On the 23d day of April, 1906, an order was entered in the United States District Court for the Northern District of Illinois in the bankruptcy proceedings that I have outlined, adjudging The Oro Dredging Company bankrupt, which adjudication found that the allegations alleged in the petition filed in bankruptcy were
125 true and that the company was insolvent, and so adjudged the company a bankrupt on that date, that date being the 23rd day of April, 1906. I expect to give the court a written brief which will contain these dates.

On the 1st day of May, 1906, upon the application of the plaintiffs in the van Houten case and the Reiling case, the receiver James K. Hunt, so appointed was authorized and directed to sell the mining

dredge, which was a portion of the property levied upon under the writs of attachment, that being after the adjudication in bankruptcy of the United States District Court for the Northern District of Illinois.

The application to sell the dredge was made, as I understand it, under a statute of this Territory, which provides for the sale of perishable property.

The COURT: That application was granted by reason of the fact that the dredge was liable to be washed away by the floods.

Mr. MCLEISH: The affidavits filed on the motion for appointment of a receiver are the affidavits of Mr. J. van Houten and Mr. D——, which set up a claim the dredge was in danger of being injured by floods coming down the valley.

So, in accordance and pursuance to the order, authorizing the sale of the dredge, Mr. Hunt, receiver, sold the dredge on June 26th, 1906, for the sum of $5000.00. On the 9th day of July, 1906, following the sale of the dredge, Frank H. Jones was appointed trustee in bankruptcy, and in the bankruptcy proceedings pending in Chicago, and on the 16th day of July, 1906, he qualified as trustee by filing and having approved his bond.

Soon after the appointment of the trustee in bankruptcy and the Chicago proceeding, the trustee applied to this court for an
126 order dissolving the writs of attachment and directing the receiver to turn over to him all the property that came into his possession as such receiver of this court, and that application was denied.

The COURT: I suppose that application was denied for the reason the receiver had sold the property and did not have it in his possession and he could not turn it over.

Mr. MCLEISH: I do not know upon what ground that was denied, but I presume at that time the dredge had been sold. That is the fact, I believe.

The intervening petition of Frank H. Jones, trustee, was then filed and a demurrer was filed to the intervening petition by the plaintiffs in each of the cases and the demurrer was sustained and leave granted the trustee to amend or file an amended intervening petition, and the amended intervening petition was filed September 24, 1906.

Following the filing of the amended intervening petition, as is shown by the record and stipulation, a restraining order was issued in the United States District Court for the Northern District of Illinois restraining J. van Houten and B. J. Young from further interference with the trustee in his attempt to regain or attempt to retain the assets of the bankrupt. Personal service of the order was served upon Mr. van Houten in Chicago. B. J. Young filed his claim in the bankruptcy court, and the court having thus secured jurisdiction over his person entered an order restraining him as well as J. van Houten. Thereupon an answer was filed by Charles Springer, the purchaser of the dredge under the sale made by James K. Hunt, receiver, to the amended intervening petition of Frank H.

Jones, trustee. This answer was filed on the 19th day of
127 October, 1907, quite recently—and I believe that is the condition of the record today. Following the filing of the answer of Mr. Springer, counsel entered into a stipulation in the case of J. van Houten and the case of H. J. Reiling, stipulating the facts in the cases in so far as the issue was raised to the amended intervening petition by Charles Springer, which stipulation is on file in the case, and is to be considered as evidence between Charles Springer and the trustee in bankruptcy, the intervening petitioner.

In support of the allegations of the intervening petitioner I will offer in evidence a certified copy of the petition filed in the United States District Court for the Northern District of Illinois, Eastern Division, in the matter of The Oro Dredging Company, bankrupt, which petition sought to adjudicate The Oro Dredging Company, a bankrupt, and ask that the same be marked—Intervening Petitioner's Exhibit No. 1.

Mr. McLEISH: I next offer in evidence an order of the court in the matter of The Oro Dredging Company, bankrupt, on the 23d day of April, 1906, being the order of adjudication on the petition Exhibit No. 1, which order I shall ask to be marked for identification as Exhibit No. 2 of the Intervening Petitioner.

Mr. McLEISH: I will next offer in evidence the order entered on the 9th day of July, 1906, being the order appointing Frank H. Jones, trustee in bankruptcy of The Oro Dredging Company, bankrupt, and ask that it be marked Intervening Petitioner's Exhibit No. 3.

Mr. McLEISH: I now offer in evidence the order of the court, etc., approving the bond of Frank H. Jones, and ask that it be marked Intervening Petitioner's Exhibit No. 4.

128 Mr. McLEISH: I now offer in evidence the certified copy of Schedule A.—3. of the schedules filed in said bankruptcy proceedings on the 22nd day of June, 1906, and ask that the same be marked Intervening Petitioner's Exhibit No. 5.

Mr. McLEISH: I will now offer in evidence in behalf of Frank H. Jones, trustee and intervening petitioner, the affidavit of J. van Houten, filed in this case, on the 21st day of March, 1905. The filing mark being a mistake on the part of the year, which affidavit was filed in this case and dated and sworn to on the 17th day of March, 1906,—having the stamp of the clerk upon it as March 21, 1905, when it should have been 1906.

I will ask that it be marked Exhibit No. 6.

Mr. McLEISH: I will now offer in evidence the order dated August 2d, 1906, or a certified copy of the order rather, authorizing Frank H. Jones to intervene in these attachment suits and take such steps to protect the interests of the trustee as he might deem necessary.

Marked Exhibit No. 7.

Mr. McLEISH: That comprises, as nearly as I can recall, all the documentary evidence, other than the stipulation, which has been entered into and filed in this case. I hardly think that should

be offered as an Exhibit, but should remain as a stipulation of facts. It was filed on the 9th day of October, 1907.

In addition to the documentary evidence there is a little evidence I would like to introduce by an examination of Mr. E. E. Studley, as to the mere description of this dredge so we will have it in the record,—that is, as against van Houten and Young.

Mr. DAVIS: I would like to have the record show this
129 evidence is offered simply against van Houten and Young and not as affecting Mr. Springer, it being already covered by stipulation.

ELMER E. STUDLEY, being first duly sworn according to law, deposes as follows, being examined by Mr. John E. McLeish.

Direct examination by Mr. MCLEISH:

Q. You have been sworn.
A. Yes, sir.
Q. Please state your name and residence.
A. Elmer E. Studley. Raton, New Mexico.
Q. Are you familiar and have you seen the property described in the amended intervening petition of Frank H. Jones, trustee,—being the property levied upon by attachment writs in this case?
A. I am somewhat familiar with it. I have seen it several times.
Q. Will you kindly describe to the court what that property is, and what it consists of, in your own language.
A. In the first place there is a large boat or dredge——

The COURT: A big bottom boat or scow?

A. Yes, sir; a big boat, something like a flat-bottomed boat, which is afloat in an artificial pond alongside of the Moreno creek, in Colfax County, Territory of New Mexico, very near to the Town of Elizabethtown in that county and territory. The boat or dredge is used to extract gold from placer dirt by means of an endless chain of heavy iron buckets that would weigh, I presume, upwards of a thousand pounds each, operated on a long arm or crane in front
of said boat or dredge by means of boilers, engines and ma-
130 chinery on board of the dredge, whereby the placer dirt is lifted from the bottom of the Moreno creek and the bottom of the pond on which the dredge floats, into a hopper on board the dredge, and from thence is conducted by means of water which is pumped on board through a long iron and steel sluice box probably 100 feet or more in length, to the rear of the dredge or down stream, where it forms a dam. As fast as the dirt is extracted in front of the dredge, it is deposited at the tail of the sluice-box and forms this dam which maintains the artificial lake, in which the dredge is floating. The dredge is constructed of wood, iron, and steel. It is used in connection with the land which is described in the amended petition of the intervening petitioner, and constitutes with the land, a mining property.
Q. Is that all, Mr. Studley?
A. There are other tools and appliances on board, such as

dynamos for electric light, engines, boilers and equipment. The dredge is moved from one side of the pond to the other side of the pond, and is kept facing up stream in the lake.

Mr. DAVIS: We have no cross-examination.

Mr. MCLEISH: Now as to the stipulation which has been entered into, perhaps it would be well for me to read the stipulation at this time.

The stipulation was here read to the court by counsel.

Mr. MCLEISH: Now, I object to the evidence of Charles Springer in so far as he would testify that the amount he bid and paid for said dredge was a fair and adequate price for said property at the date of sale, on the ground that Charles Springer has not
131 qualified himself to so testify, in that it does not appear that he is familiar with the values of property of this description, and there is no evidence qualifying him to testify as to the value of that dredge.

I further object to the evidence of Charles Springer that prior to and at the time he purchased the dredge he had no knowledge or notice that proceedings of any nature or character whatsoever had been commenced at Chicago, Illinois, or any other place, to adjudge The Oro Dredging Company a bankrupt, and that he was not informed of the fact that such proceedings were had until two months after his said purchase.

I object to that evidence upon the ground that it is immaterial, in that, the filing of the petition in bankruptcy and the entry of the order of adjudication thereon was notice to Mr. Springer, and it is immaterial to the issue involved in this case whether Mr. Springer had actual notice of the proceedings in bankruptcy, or not.

I further object to the evidence of Charles Springer that he had no notice of any kind or character prior to or at the time of said purchase, that said Oro Dredging Company was insolvent, or that proceedings had been commenced or were pending which had for their purpose the securing of the order adjudging said Oro Dredging Company a bankrupt, on the ground that such evidence is also immaterial, in that the order of adjudication found that the allegations of the petition filed in bankruptcy were true, and hereby fixed the solvency or insolvency of The Oro Dredging Company, and that the order of adjudication was notice to Charles Springer and it is immaterial whether he had actual notice of the entry of said order of adjudication or of the fact that said company was insolvent. I also object to the evidence of Charles Springer
132 to the effect that since the purchase and taking possession of said property by him he had paid out for care, insurance and repairs to said mining dredge, dam, ditches and head-gates, necessary to protect said dredge from storms, etc., the sum of $1500.00, on the ground that such evidence is immaterial to the issue involved in this case. If Mr. Springer has title to that dredge, as he so claims, it is immaterial what he paid for taking care of the dredge during his ownership.

Mr. MCLEISH: That is all the evidence we care to introduce. I should like to preserve, however, the right, in case something has

slipped me, to put it in evidence before we adjourn, but I believe that that is all the evidence that we care to produce.

Mr. DAVIS: We have no evidence here at this time. We reserve the same right, however. I see no possibility of our putting in any evidence except as to the objection of the gentleman as to Mr. Springer's lack of knowledge, etc.—In any event, the stipulation sets up the issues upon which the case is to be tried.

Mr. MCLEISH: Now I think we are ready to argue to the court the law involved in this case as it appeals and appears on the face of the proceedings to counsel representing the trustee.

I have outlined the argument so as to save as much time as possible in written form, and will try not to get away from it.

(Here follows argument of Mr. McLeish.)

133 INTERVENING PETITIONER'S EXHIBIT No. 1.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

To the Honorable Judge of the District Court of the United States for said District and Division:

The petition of Irving Usner of Chicago, Illinois, The Bucyrus Company, a corporation of Milwaukee, Wisconsin, and Clara C. Cramer, of Chicago, Illinois, respectfully shows:

That The Oro Dredging Company is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; that such corporation has for the greater portion of six months next preceding the date of the filing of this petition had its principal place of business at the City of Chicago, in the County of Cook, in the State, Division, and District aforesaid, and owes debts to the amount of one thousand ($1000.00) dollars; that said corporation is principally and has during said period of six months been principally engaged in mining and mercantile pursuits.

That your petitioners are creditors of said The Oro Dredging Company, a corporation, as aforesaid, having provable claims amounting in the aggregate, in excess of securities held by them to the sum of five hundred dollars ($500.00); that the nature and amount of your petitioners' claims are as follows: The claim of your petitioner Irving Usner amounts to $1750 and is for money heretofore loaned and advanced by said petitioner, Irving Usner, to said corporation, and is evidenced by the note of said corporation; the claim of your petitioner, The Bucyrus Company, amounts to $205.00, and is for goods, wares and merchandise hereto-
134 fore sold and delivered to said The Oro Dredging Company at the latter's special instance and request; and the claim of Clara C. Cramer amounts to $25.00, and is for services rendered to said corporation, The Oro Dredging Company, at the latter's special instance and request, as stenographer and clerk.

And your petitioners further represent that said The Oro Dredging Company is insolvent and that within four months next preceding

the date of this petition said The Oro Dredging Company committed divers acts of bankruptcy, in that said The Oro Dredging Company did heretofore, while insolvent, to-wit,—on December 20th, 1905, pay to Duncan Moore a creditor, the sum of $30.00, with intent to prefer such creditor over the other creditors of said The Oro Dredging Company, and did commit divers acts of bankruptcy in that it did within the period of four months heretofore pay to divers of its creditors, while it was insolvent as aforesaid, divers sums of money, with intent to prefer such creditors over the other creditors of said The Oro Dredging Company.

Wherefore, your petitioners pray that service of this petition, with a subpœna, may be made upon said The Oro Dredging Company, as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged by this court to be a bankrupt within the purview of said acts.

IRVING USNER,
CLARA C. CRAMER,
THE BUCYRUS COMPANY,
By H. P. EELS, *Secretary*.
Petitioners.

SHOPE, MATHIAS,
ZANE & WEBER,
HOGAN & HOGAN,
Attorneys for Petitioners.

135 UNITED STATES OF AMERICA.
Northern District of Illinois, Eastern Division:

STATE OF ILLINOIS.
County of Cook, ss:

Irving Usner, being first duly sworn, on his oath says, that he is one of the petitioners above named, and says that the statements contained in the foregoing petition subscribed by him are true.

IRVING USNER.

Subscribed and sworn to before me this 7th day of March, 1906.
[SEAL.] E. BENTLEY HAMILTON,
Notary Public.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

STATE OF OHIO,
Cuyahoga County, ss:

H. P. Eels, being first duly sworn, on his oath says, that he is the duly authorized agent of The Bucyrus Company, and that the foregoing petition by it subscribed is true.

H. P. EELS.

Subscribed and sworn to before me this 8th day of March, A. D. 1906.
[SEAL.] E. J. McGUIRE,
Notary Public.

136 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

STATE OF ILLINOIS,
County of Cook, ss:

Clara C. Cramer, being first duly sworn on her oath states that she is one of the petitioners above named, and says that the statements contained in the foregoing petition subscribed by her are true.

CLARA C. CRAMER.

Subscribed and sworn to before me this 7th day of March, A. D. 1906.

[SEAL.] E. BENTLEY HAMILTON,
Notary Public.

(Endorsed:) 13242. In the District Court of the United States, In Bankruptcy. In Re The Oro Dredging Company. Filed Mar. 12, 1906, at 2:45 P. M. N. T. C. MacMillan, Clerk. Hogan & Hogan, attorneys and counselors, Chicago.

In the United States District Court for the Northern District of Illinois, Eastern Division.

I, T. C. Millan, Clerk of the District Court of the United States of America, for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the petition of Irving Usner, et al., in case No. 13242, entitled Oro Dredging Co., Bankrupt, as same appears from the original filed in said court on the twelfth day of March, A. D. 1906, and now remaining in my custody and control.

137 In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this Third day of October, A. D. 1907.

[SEAL.] T. C. MacMILLAN, *Clerk.*

INTERVENING PETITIONER'S EXHIBIT No. 2.

MONDAY, *April 23d*, A. D. 1906.

In the District Court of the United States for the Northern District of Illinois.

Present:—The Honorable Solomon H. Bethea, Judge.

13242. In Bankruptcy.

In the Matter of THE ORO DREDGING COMPANY, Bankrupt.

At Chicago, in said District, on the twenty-third day of April, A. D. 1906, before the Honorable Solomon H. Bethea, Judge of said court in bankruptcy, the petition of Irving Usner, et al., that the said The Oro Dredging Company, be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said The Oro Dredging Company is hereby declared and adjudged Bankrupt accordingly.

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the
138 United States of America for the Northern District of Illinois do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said court on the 23d day of April, A. D. 1906, as fully as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said District, this Third day of October, A. D. 1907.

[SEAL.] T. C. MacMILLAN, *Clerk*.

INTERVENING PETITIONER'S EXHIBIT No. 3.

In the District Court of the United States for the Northern District of Illinois.

No. 13242.

In the Matter of THE ORO DREDGING COMPANY, Bankrupt.

It appearing that Sidney C. Eastman, the Referee to whom this cause is referred, is absent from said District, and —

On this Ninth day of July, A. D. 1906, this cause coming on for a first meeting of the creditors, and it appearing to the Court

that due notice of the first meeting of the creditors of the bankrupt has been given by mailing notices to all creditors named in the schedule at least ten days before this date, and by publication in the Chicago Legal News, the last publication being at least one week before this date, as required by law, and the rules of this court,—

It is therefore ordered that a first meeting of the creditors of said bankrupt be held according to said notice —

139 Whereupon, Pursuant to said notice, the first meeting of creditors was held at Room 905 Monadnock Block, Chicago, Illinois, being the office of the Referee, on the Ninth day of July, A. D. 1906, at the hour of 10 A. M.

It is hereby ordered that all claims be allowed pro tempore. Objections to be filed in 10 days; notice of filing objections to be served on claimant by mail or on local attorney at once.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the Chicago Legal News, I, the undersigned, referee, of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims have been allowed and were present or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do appoint Frank H. Jones of Chicago, in the County of Cook and State of Illinois, as trustee of the same, with bond in the sum of $1,000.00.

Adjourned to August 15th, 1906, at 10 o'clock A. M.

FRANK L. WEAN,
Referee in Bankruptcy.

In the District Court of the United States of America for the Northern *Division* of Illinois, Eastern Division.

I, Sidney C. Eastman, one of the referees in bankruptcy
140 for the Counties of Cook, McHenry, and Lake, in the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order entered on July 9th, 1906, in the matter of Oro Dredging Company, in Bankruptcy, No 13242.

In Testimony Whereof, I have hereunto set my hand at my office in Chicago, in said District, this 18th day of July, A. D. 1906.

SIDNEY C. EASTMAN,
Referee in Bankruptcy.

District Court of the United States, Northern District of Illinois, Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that I am well acquainted with the handwriting of Sidney C. Eastman,

whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same, and is now, one of the referees in bankruptcy for the Counties of Cook, Lake, and McHenry in said Northern District of Illinois, duly appointed, qualified, and commissioned, and that as such, full faith and credit are, and of right ought to be given to all his official acts.

In testimony whereof, I have hereunto subscribed my hand and affixed the seal of said court, at my office in Chicago, in said district, this Third day of October, A. D. 1907.

[SEAL.] T. C. MacMILLAN, *Clerk.*

141 INTERVENING PETITIONER'S EXHIBIT No. 4

Order Approving Trustee's Bond.

At a Court of Bankruptcy Held in and for the Northern District of Illinois, at Chicago, this 16th Day of July, 1906.

Before Sidney C. Eastman, Referee in Bankruptcy.

In the District Court of the United States for the Northern District of Illinois.

In Bankruptcy.

In the Matter of THE OHIO DRESSING COMPANY, Bankrupt.

It appearing to the Court that Frank H. Jones of Chicago, and in said district, has been duly appointed trustee of the estate of the above named bankrupt, and has given bond with sureties for the faithful performance of his official duties in the amount fixed by order of the court, to-wit:—in the sum of One thousand dollars, it is ordered that the said bond be, and the same is hereby approved.

SIDNEY C. EASTMAN,
Referee in Bankruptcy.

In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America, for the Northern District of Illinois, do
142 hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said court on the 16th day of July, A. D. 1906, as fully as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 28th day of July, A. D. 1906.

T. C. MacMILLAN, *Clerk*.

INTERVENING PETITIONER'S EXHIBIT No. 5.

Schedule A.

Creditors whose claims are unsecured.

N. M.—When the name and residence of any drawer, maker, indorser or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.

INTERVENING PETITIONER'S EXHIBIT No. 5.

Schedule A.

Creditors Whose Claims Are Unsecured.

N. M.—When the name and residence of any drawer, maker, indorser or holder of any bill or note, etc., are unknown, the fact must be stated and also the name and residence of the last holder known to the debtor. The debt to each creditor must be stated in full, and any claim by way of setoff stated in the schedule of property.

Reference to ledger or voucher	Names of creditors	Residence—If unknown, fact must be stated	When and where contracted	Nature and consideration of the debt and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person, and if so, whom	Amount
Bill	B. J. Young & Sons	Elizabethtown, N. M.	Elizabethtown, 1905 6.	Merchandise	$1,845.55
"	H. H. Hawkins	" "	"	"	164.74
"	Taylor Iron & S. Co.	Highbridge, N. J.	" 1905.		2,483.28
"	The Bucyrus Co.	So. Milwaukee, Wis.	Chicago 1905		205.10
"	A. Leschen & Sons Rope Co.	St. Louis, Mo.	" 1905.	Suit lost on this claim.	170.06
"	Herman Froelick	Elizabethtown, N. M.	Etown 1905.		17.64
"	Remsberg Merc. Co.	Raton, N. M.	" 1905.		17.56
"	C. C. Forester	Etown	" 1905.		27.00
"	Louis Leonard	Etown	" 1905.		7.40
"	C. F. Hoeckel	Denver, Colo.	" 1905.		1.80
"	Continental Oil Co.	Pueblo, Colo.	" 1905.		133.46
"	The Sternes-Rogers Mfg. Co.	Denver, Colo.	" 1905.	Attachment issued on this claim in New Mexico.	210.42
"	Hendrie & Bolthoff	Denver, Colo.	Chicago, Ill.		98.07
"	H. J. Reiling	520 McPhee Bldg., Denver, Colo.		Attachment on this claim in New Mexico.	890.82
"	The Marine Ins. Co., Ltd.	15 Ex. Pl., Jersey City.	1905	Insurance premium	29.83
"	The Rocky Mt. Timber Co.	Weston, Colo.	Etown 1905 6	Royalties	202.57
"	J. Van Houten	Raton, N. M.	Money loaned Raton, N. M.	Money loaned	5,168.89
"	1st Nat'l Bank	Raton, N. M.	Raton, N. M. 1905 6.	Overdraft	1,577.17
"	Irving Usner	292 Wabash Ave., Chicago, Ill.	Chicago, Ill.	Money loaned	1,734.78
					$14,985.78

FRANK H. JONES, Bankrupt.

144 In the United States District Court for the Northern District of Illinois, Eastern Division.

I, T. C. Mac Millan, Clerk of the District Court of the United States of America, for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of Schedules A, (3) in case No. 13242, The Oro Dredging Company, Bankrupt, as same appears from the original filed in said court on the 22d day of June, A. D. 1906, and now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, on said district, this Third day of October, A. D. 1907.

[SEAL.] T. C. MacMILLAN, *Clerk*.

INTERVENING PETITIONER'S EXHIBIT No. 6.

District Court, Fourth Judicial District, County of Colfax, Territory of New Mexico.

No. —.

H. J. REILING
vs.
ORO DREDGING COMPANY.

No. —.

J. VAN HOUTEN
vs.
ORO DREDGING CO.

I, van Houten, being first duly sworn according to law says: that
is the plaintiff in one of the above entitled suits, that under
145 and by virtue of attachment suits issued in said causes, certain property of the defendant Oro Dredging Company has been attached. That the principal item of property so attached is a mining dredge, located in the Moreno Valley, Colfax County, Territory of New Mexico. That said dredge contains expensive machinery for handling large amounts of placer earth containing gold. That the said dredge and machinery cost Seventy-five thousand dollars. That it has not been operated for four months, owing to the fact that it is almost impossible to operate the same in the winter, and for other causes. That said dredge and machinery are very much out of repair, and should be repaired at once. In addition the said dredge is surrounded by water and mud, and at almost any time heavy water might come down the stream of water in which said dredge is operated and capsize it, or do other further material injury. That there should be work done to minimize this danger. Deponent further says that he is informed and believes that the said

dredge if repaired could be operated and the danger from high water obviated.

J. VAN HOUTEN.

Sworn and subscribed to before me this 17th day of March, 1906.

WM. A. CHAPMAN,
Notary Public.

My commission expires October 7th, 1907.

146 INTERVENING PETITIONER'S EXHIBIT No. 7.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 13242.

In the Matter of THE ORO DREDGING COMPANY, Bankrupt.

This matter coming on to be heard upon the motion of Frank H. Jones, Trustee herein, and the petition of the said Trustee filed in support of said Motion, having been duly considered by this court; and it appearing to this court that the Honorable Sidney C. Eastman, Referee in Bankruptcy herein, to whom this cause was referred by Judge Landis, is absent from the State, and this matter coming on to be heard before me in the absence of said Referee Eastman, the court finds that it is an emergency matter, and that Frank H. Jones, Trustee, should be authorized to intervene in certain attachment suits started in Colfax County, in the Territory of New Mexico:—

It is therefore adjudged and decreed, that Frank H. Jones, Trustee of The Oro Dredging Company, Bankrupt, be and he is hereby authorized to intervene in all attachment suits and other suits, brought in the County of Colfax, in the Territory of New Mexico, against The Oro Dredging Company, or that he may institute a separate suit or suits to recover possession of the property of said Oro Dredging Company, as he may be advised.

FRANK L. WEAN, *Referee.*

August 2nd, 1906.

147 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

I, Sidney C. Eastman, one of the referees in bankruptcy for the Counties of Cook, McHenry and Lake, in the Northern District of Illinois, do hereby certify, the above and foregoing to be a true and correct copy of an order entered on August 2nd, 1906, in the matter of The Oro Dredging Company, in Bankruptcy, No. 13242.

In Testimony Whereof, I have hereunto set my hand at my office, in said District, this 3d day of August, A. D. 1906.

SIDNEY C. EASTMAN,
Referee in Bankruptcy.

(Endorsements): No. 2702. No. 2720. District Court, Colfax County. J. van Houten, plaintiff, vs. The Oro Dredging Company, defendant. No. 2702. B. J. Young, plaintiff, vs. The Oro Dredging Company, defendant, No. 2720. Hearing before Hon. Wm. J. Mills, on Friday, Nov. 8th, 1907, at 2 P. M.

And afterwards, to-wit, on January 2nd, 1908, there was filed in said clerk's office, Findings of Facts and Conclusions of law by the court, which said finding of facts and conclusions of law is in words and figures as follows, to-wit:—

148 In the District Court Sitting within and for the County of Colfax, in the Territory of New Mexico.

No. —.

J. VAN HOUTEN, Plaintiff.
vs.
THE ORO DREDGING COMPANY, Defendant; and FRANK H. JONES, Trustee, Intervenor.

This cause coming on to be heard on the intervening petition of Frank H. Jones, Trustee, filed in said cause, and the answer of Charles Springer thereto, and the court having considered the pleadings, records, and papers filed in said cause and the proofs adduced therein, and having heard Messrs. Scott, Bancroft & Stephens and Elmer E. Studley, on behalf of said Trustee, and having considered the briefs filed on behalf of said Trustee and on behalf of said Charles Springer, filed therein by Chas. A. Spiess, Esq., and being now fully advised and informed in the premises, doth find:—

1. That the writ of attachment in the above entitled cause was issued by the Clerk of this Court on the 23d day of February, 1906, and duly executed on the 27th day of February, 1906, by the Sheriff of Colfax County, New Mexico, by levying upon a certain mining dredge, together with tools, machinery, and other property used in connection therewith, and certain real estate, situated in said County, all said property—real estate and personal—
149 then being the property of the Oro Dredging Company, defendant herein.

2. That on the 19th day of March, A. D. 1906, upon application of plaintiff, James K. Hunt was duly appointed by this Court as Receiver for the purpose of holding and conserving the said mining dredge and other property appurtenant thereto and used in connection therewith; and said Receiver was directed by the Court to give notice to each of the stockholders of said Oro Dredging Company, of his appointment as such Receiver, which notice he gave so far as he could ascertain the names of such stockholders.

3. That on the 1st day of May, 1906, a petition was duly presented to the Judge of this Court for an order directing the sale of said mining dredge, so attached as aforesaid, it being alleged as

ground therefor, that the said dredge was of a perishable nature and was liable to be diminished in value before the final adjudication of this case, and said Judge of this Court having heard and considered the testimony of witnesses as to said dredge and equipment, and it appearing that the defendant had not given bond to retain the possession of the same, and the Judge of this Court believing that the interests of both plaintiff and defendant would be promoted by the sale of the same, ordered the said Receiver, James K. Hunt, to sell said dredge and equipment, and directed that said sale should be made at public auction at the City of Raton, at the front door of the Court House, after thirty days' notice of the time and place of such sale, by publication once each week for four successive weeks, in The Raton Range, a newspaper published in said City of Raton, and that such sale should be made to the highest bidder for cash thereat.

4. That said Receiver caused the publication to be
150 duly made as provided in said order, and upon the completion thereof of the 26th day of June, offered for sale to the highest bidder, for cash, at the place specified in said order, the said dredge and equipment.

5. That at the sale aforesaid, Charles Springer was the highest and best bidder for the property aforesaid, bidding the sum of five thousand dollars in cash therefor, and said Receiver thereupon sold the said dredge and equipment to said Charles Springer, taking in payment therefor the said sum of five thousand dollars, which said sum, less certain costs and expenses, was thereupon by him paid into this Court and is still held by the Clerk of this Court.

6. That on the 17th day of July, A. D. 1906, the sale aforesaid, was, on report of said Receiver, duly approved and confirmed.

7. That upon the sale aforesaid, the said Charles Springer took possession of said dredge and equipment, under the sale aforesaid, and ever since has been and still is in the actual possession thereof.

8. That said dredge, at the time of the application aforesaid, and at the time of said order of sale, and at the time of the sale thereof, was of a perishable nature and liable to be lost and diminished in value before the final adjudication of this case.

9. That five thousand dollars was a fair and adequate price for the dredge and equipment aforesaid, at the time of said sale, in its then condition and situation.

10. That on the 12th day of March, 1906, a petition in bankruptcy was filed in the United States District Court for the Northern District of Illinois, against The Oro Dredging Company, defendant herein, and thereafter such proceedings were had that on the
151 23d day of April, 1906, the said defendant was by said court duly adjudged a bankrupt, and thereafter, on the 9th day of July, 1906, the petitioner herein, Frank H. Jones, was duly appointed trustee in bankruptcy of said defendant, and duly qualified as such on the 16th day of July, 1906.

11. That the appearance of Frank H. Jones, trustee as aforesaid, was first entered in this cause of the 2nd day of August, A. D. 1906, and there had not been prior to said 2nd day of August, 1906, any

pleadings or papers, of any description whatsoever, filed in said cause, advising this court or the parties to the said attachment proceedings, that the petition for the adjudication of the bankruptcy of the defendant company had been filed as aforesaid, or advising the said court or the judge thereof, or any of said parties, that the said defendant company had been adjudged a bankrupt.

12. That Charles Springer, prior to the time he purchased the dredge and equipment aforesaid, had no knowledge nor notice of any kind that proceedings of any nature or character whatsoever had been commenced in the District Court of the United States for the Northern District of Illinois, the purpose of which was to cause the defendant company to be adjudicated a bankrupt, and had no knowledge or information of the filing or pendency of any of the bankruptcy proceedings hereinbefore referred to, until two weeks after the time of his purchase at the sale aforesaid, and that the said Charles Springer had no knowledge or notice at the time of his said purchase at the sale aforesaid, that the said defendant company was insolvent.

13. That the said Charles Springer was a bona fide pur-
152 chaser of said mining dredge and equipment, for value, and acquired the same without notice or reasonable cause for inquiry as to whether or not there had been commenced proceedings in bankruptcy against said defendant company.

And from the foregoing facts the court makes the following

Conclusions of Law.

1. That the sale aforesaid of said dredge and equipment, and the approval thereof, vested in said Charles Springer a good and perfect title thereto, free from any rightful claim on the part of the said Frank H. Jones, trustee, as aforesaid.

2. That the writ of attachment in the above entitled cause having been levied on the real estate of the defendant company within four months prior to the filing of the petition in bankruptcy against it, and no rights of bona fide purchasers having intervened, the lien thereof was vacated and dissolved by the said adjudication of bankruptcy.

It is therefore considered and adjudged by the court, that the lien of the said attachment be and it is hereby vacated and dissolved, and the Sheriff of Colfax County is hereby ordered and directed to deliver over the possession of the real estate which he, the said sheriff, is holding by virtue of said writ of attachment, to the said Frank H. Jones, trustee, and.—

It is further considered and adjudged by the court, that the petition of the said Frank H. Jones, trustee, in so far as it seeks an order directing that said Frank H. Jones, trustee, be awarded possession of said mining dredge and its equipment, be and
153 it is hereby denied, and it is considered and adjudged that the said Charles Springer go thereof hence without day.

(Signed) WILLIAM J. MILLS,
Chief Justice and Judge of said District Court.

Dated, Las Vegas, New Mexico, this 30th day of December, 1907.

(Endorsements): No. —. In the District Court, County of Colfax, Territory of New Mexico; J. van. Houten vs. Oro Dredging Co., defendants, and Frank H. Jones, Trustee, Intervenor. Findings of Facts, Conclusions of Law, and Judgment.

And afterwards on February 17th, 1908, there was filed in said clerk's office, an application for an appeal by Frank H. Jones, as trustee in bankruptcy, which said application for an appeal is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court Sitting within and for the County of Colfax, in the Territory of New Mexico.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant.

Application for an Appeal.

The intervenor in the above entitled cause, Frank H. Jones, as trustee in bankruptcy of The Oro Dredging Company,
154 a bankrupt, hereby prays an appeal to the Supreme Court of the Territory of New Mexico, from the judgment herein rendered, made and decreed in the said District Court, sitting within and for the County of Colfax, in the Territory of New Mexico, and within the Fourth Judicial District thereof, on the 30th day of December, A. D. 1907, in favor of Charles Springer, the purchaser of a certain mining dredge at an attachment sale, and against the said intervenor, Frank H. Jones, as trustee in bankruptcy of The Oro Dredging Company, a bankrupt, and from the whole of said Judgment, and all orders and decrees therein entered and rendered in said cause.

ELMER E. STUDLEY,
Raton, New Mexico.
SCOTT, BANCROFT & STEPHENS,
184 *La Salle Street, Chicago, Ill.,*
Attorneys for Frank H. Jones, Trustee of The Oro Dredging Company, a Bankrupt, Intervenor.

(Endorsements): No. 2702. Territory of New Mexico. Fourth Judicial District Court. In and for the County of Colfax. J. van Houten, plaintiff vs. Oro Dredging Company, defendant. Frank H. Jones, Trustee in Bankruptcy of The Oro Dredging Company, a Bankrupt, Intervenor. Application for an Appeal. Filed in my office Feb. 17-1908, Secundino Romero, Clerk. Elmer E. Studley, and Scott, Bancroft & Stephens, Attorneys for Frank H. Jones as such Trustee.

And afterwards to-wit, on February 21st, 1908, there was filed in said clerk's office an order of court granting an appeal, which said order granting an appeal is in words and figures as follows, to-wit:

155 TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court Sitting within and for the County of Colfax, in the Territory of New Mexico.

No. 2702.

J. VAN HOUTEN, Plaintiffs,
vs.
ORO DREDGING COMPANY, Defendant; FRANK H. JONES, Trustee in Bankruptcy of The Oro Dredging Company, a Bankrupt, Intervenor.

Order Granting an Appeal.

And now comes Frank H. Jones, as trustee in bankruptcy of The Oro Dredging Company, a bankrupt, Intervenor in the above entitled cause, by Elmer E. Studley, and Scott, Bancroft and Stephens, his attorneys, and prays for an appeal to the Supreme Court of the Territory of New Mexico, from the judgment and decree herein tendered, made and entered on the 30th day of December, A. D. 1907, in favor of Charles Springer, the purchaser of a certain mining dredge on an attachment sale, and against said Frank H. Jones, as such trustee, intervenor herein: and after due consideration thereof, and the court being fully informed and advised in the premises, and having deliberated thereon:

It is considered, adjudged and ordered by the court that the appeal prayed for, as aforesaid, be and the same is hereby allowed upon the condition that the said Frank H. Jones, trustee as
156 aforesaid and intervenor herein, within ten days herefrom, make and execute a good and sufficient appeal bond to pay all costs for which the said Frank H. Jones trustee in bankruptcy of The Oro Dredging Company, a bankrupt, intervenor, shall become liable on such appeal with sureties thereon to be approved by the clerk of this court, and upon the filing of said bond the clerk of this court shall issue a citation to Charles Springer, the said purchaser, and to J. van Houten, the plaintiff herein, directing them to appear in the Supreme Court of the Territory of New Mexico, to answer the appeal herein taken.

Done at Las Vegas, in the Territory of New Mexico, this 21st day of February, A. D. 1908.

WILLIAM J. MILLS.
Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District Court Thereof.

(Endorsements): No. 2702. In the District Court, Sitting within and for the County of Colfax, in the Territory of New Mexico. J. van Houten, Plaintiff, vs. Oro Dredging Company, Defendant. Order Granting An Appeal. Filed in my office Feb. 21, 1908. Secundino Romero, Clerk. Ent. page 585 R. H. C. Elmer E. Studley, Raton, N. M.; Scott, Bancroft & Stephens, Chicago, Ill., Attorneys for Trustee Frank H. Jones.

And afterwards, to-wit on February 26th, 1908, there was filed in said clerk's office an appeal bond, which said appeal bond is in words and figures as follows, to-wit:

157 TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court Sitting within and for the County of Colfax, in the Territory of New Mexico.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant; FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor.

Bond on Appeal.

Know All Men By These Presents: That we, Frank H. Jones, of the City of Chicago, County of Cook and State of Illinois, trustee in bankruptcy of the Oro Dredging Company, a bankrupt, and intervenor in the above entitled cause, as principal and Alfred Jelfs and Stephen A. Wiseman of the County of Colfax in the Territory of New Mexico, as sureties, are held and firmly bound unto Charles Springer and J. van Houten, in a sum sufficient to pay all costs for which the said Frank H. Jones, trustee in bankruptcy of The Oro Dredging Company, a bankrupt, intervenor, shall become liable on an appeal of this cause above entitled to the Supreme Court of the Territory of New Mexico, for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

158 Sealed with our seals and dated this 24th day of February, A. D. 1908.

The conditions of the above obligations are such, that whereas, heretofore, to-wit, on the 30th day of December, A. D. 1907, a judgment was entered in the District Court of the Fourth Judicial District sitting within and for the County of Colfax, in said District, in the Territory of New Mexico, and in the above entitled cause, in favor of Charles Springer, the purchaser of a certain mining dredge on an attachment sale, and against Frank H. Jones, trustee in bankruptcy of The Oro Dredging Company, a bankrupt, intervenor

herein, as is in said judgment more fully specified, from which judgment of said court the said Frank H. Jones, trustee in bankruptcy of The Oro Dredging Company, a bankrupt, intervenor herein, has taken an appeal to the Supreme Court of the Territory of New Mexico.

Now, if the said Frank H. Jones, trustee in bankruptcy of The Oro Dredging Company, a bankrupt, intervenor herein, shall and will duly prosecute said appeal and pay all costs that may be adjudged against him on said appeal, then the above obligation to be null and void, otherwise to remain in full force and virtue.

FRANK H. JONES, [SEAL.]
Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Principal.
ALFRED JELFS, [SEAL.]
STEPHEN A. WISEMAN, [SEAL.]
Sureties.

159 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

Be it remembered that on this 24th day of February, A. D. 1908, before me, the undersigned authority, personally appeared Frank H. Jones to me known and known to me to be the identical individual mentioned and described in the foregoing bond on appeal as the trustee in bankruptcy of The Oro Dredging Company, a bankrupt, intervenor, and he did thereupon duly acknowledge to me that he had signed and executed the foregoing bond on appeal for the purposes therein set forth as his free act and deed.

CHARLES OWEN RUNDALL,
[NOTARIAL SEAL.] *Notary Public in and for the County of Cook, in the State of Illinois.*

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

Be it remembered that on this 26th day of February, A. D. 1908, before me, the undersigned authority, personally appeared Alfred Jelfs and Stephen A. Wiseman of the County of Colfax, in the Territory of New Mexico, and they did each severally thereupon duly acknowledge to me that they had signed and executed the foregoing bond on appeal for the purposes therein set forth as their individual free act and deed; and they were each duly sworn by me according to law and thereafter did each severally state to me that he, the said Alfred Jelfs is worth the sum of five hundred dollars ($500.00); and that he, the said Stephen A. Wiseman is worth the sum
160 of one thousand dollars ($1000) over and above all debts and liabilities, and property exempt from execution.

ALFRED JELFS.
STEPHEN A. WISEMAN.

Subscribed and sworn to before me this 26th day of February, A. D. 1906.

JOHN MORROW

[NOTARIAL SEAL.] *Notary Public in and for the County of Colfax, in the Territory of New Mexico.*

STATE OF ILLINOIS,
Cook County, ss:

I, Joseph F. Haas, county clerk of the County of Cook, do hereby certify that I am the lawful custodian of the official records of notaries public of said county, and as such officer am duly authorized to issue certificates of magistracy, that Charles Owen Rundall whose name is subscribed to the proof of acknowledgment of the annexed instrument in writing, was, at the time of taking such proof of acknowledgment, a notary public in and for Cook County, duly commissioned, sworn and acting as such and authorized to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, and to administer oaths; all of which appears from the records and files of my offices; that I am well acquainted with the handwriting of said notary and verily believe that the signature to the said proof of acknowledgment is genuine; and, further, that the annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

In testimony whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of
161 Chicago, in the said county, this 24th day of February, 1908.

JOSEPH F. HAAS,

[COURT SEAL.] *County Clerk.*

The above — foregoing bond on appeal is hereby approved by me this 26th day of February, A. D. 1908.

SECUNDINO ROMERO,

[COURT SEAL.] *Clerk of the Fourth Judicial District Court, Territory of New Mexico.*

By E. G. TWITTY, *Deputy Clerk.*

(Endorsed:) No. 2702. In the District Court, sitting within and for the County of Colfax, in the Territory of New Mexico. J. van Houten, plaintiff, vs. Oro Dredging Company, defendant. Frank H. Jones, trustees in Bankruptcy of the Oro Dredging Co., a bankrupt, intervenor. Bond on appeal. Filed in my office Feb. 26th, 1908. Secundino Romero, Clerk. Elmer E. Studley, Raton, N. M., and Scott, Bancroft and Stephens, 184 La Salle St., Chicago, Ill., Attorneys for Frank H. Jones, as such trustee.

And afterwards, to-wit, on March 4th, 1908, there was filed in said clerk's office a praecipe for transcript of record in said cause, which said praecipe is in words and figures as follows, to-wit:

162 TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court of the Fourth Judicial District Sitting within and for the County of Colfax, in the Territory of New Mexico.

No. 2702.

J. VAN HOUTEN, Plaintiff.
vs.
ORO DREDGING COMPANY, Defendant; FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor.

Præcipe.

To Secundino Romero, Clerk of the Fourth Judicial District Court of the Territory of New Mexico:

Please prepare transcript of record in the above entitled cause of the following:

1st. Transcript of all journal or docket entries in said cause.

2d. Copies of all writs, complaint, answer, intervening petition, amended intervening petition, petition of Charles Springer, answer of Charles Springer, stipulation, proceedings had on trial, and all orders, decrees, judgments, and all papers and their endorsements filed in this cause of every kind, nature and description.

3d. Attach to said transcript thus prepared your certificate of authentication.

ELMER E. STUDLEY,
Raton, New Mexico,
SCOTT, BANCROFT & STEPHENS,
184 *La Salle Street, Chicago, Ill.,*
Attorneys for Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor.

163 (Endorsements:) No. 2702. In the District Court of the Fourth Judicial District, sitting within and for the County of Colfax, in the Territory of New Mexico. J. van Houten, plaintiff, vs. Oro Dredging Company, defendant. Frank H. Jones, Trustee, etc. Intervenor. Præcipe. Filed in my office Mar. 4, 1908, Secundino Romero, Clerk. Elmer E. Studley, Scott, Bancroft & Stephens, Attorneys for Trustee.

And afterwards to-wit, on March 4th, 1907, there was filed in said clerk's office a citation,—and two copies of said citation issued by the clerk, which said citation is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

In the District Court of the Fourth Judicial District. Sitting within and for the Territory of New Mexico.

No. 2702.

J. VAN HOUTEN, Plaintiff,
vs.
ORO DREDGING COMPANY, Defendant; FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor.

Citation.

To J. van Houten and Charles Springer, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the Territory of New Mexico to be held in the City of Santa Fe, in said Territory, within ninety (90) days after
164 the service of this citation upon you pursuant to a notice of appeal filed in the office of the clerk of the District Court of the Fourth Judicial District of the Territory of New Mexico, by the above named trustee in bankruptcy of The Oro Dredging Company, a bankrupt, as intervenor herein, and an order of the District Court of the Fourth Judicial District sitting within and for the County of Colfax, in said Territory of New Mexico, made and entered on the 21st day of February, A. D. 1908, granting an appeal to the Supreme Court of the Territory of New Mexico from a judgment rendered by said court on the 30th day of December, A. D. 1907, in cause No. 2702 wherein said J. van Houten was plaintiff and Oro Dredging Company was defendant, and said Frank H. Jones, trustee of The Oro Dredging Company, a bankrupt, was intervenor, and Charles Springer was the purchaser of a certain mining dredge at an attachment sale, to answer said appeal, and to show cause, if any there be, why said judgment and decree mentioned shall not be corrected and speedy justice *not* be done to the parties in this behalf.

Witness: The Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourt- Judicial District Court thereof this 4th day of March, A. D. 1908.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

(Endorsements:) No. 2702. In the District Court of the Fourth Judicial District, sitting within and for the County of Colfax, in the Territory of New Mexico. J. van Houten, plaintiff, vs. Oro Dredging Company, defendant. Frank H. Jones, Trustee, etc. Intervenor. Citation of Appeal. Filed in my office
165 Mar. 10, 1908. Secundino Romero, Clerk. Elmer E. Studley, Raton, N. M.; Scott, Bancroft & Stephens, Chicago, Ill. Attorneys for Trustee.

And afterwards to-wit, on March 10th, 1908, there was filed in said Clerk's office a copy of the above and foregoing citation, with the following return of the sheriff of service thereon, which said return of service is in words and figures as follows, to wit:

Sheriff's Return of Service.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

This is to certify that the within citation on appeal came to hand the 6th day of March, A. D. 1908, and that I served said citation on J. van Houten in my said County of Colfax, in the Territory of New Mexico, on said 6th day of March, A. D. 1908, by giving to and leaving with him personally, the said J. van Houten, a true and exact copy of said citation on appeal; and I do further certify that I served said citation on Charles Springer in my said County of Colfax, in the Territory of New Mexico, on the 9th day of March, A. D. 1908, by giving to and leaving with him personally the said Charles Springer, a true and exact copy of said citation on appeal; and I do further certify that the persons so served as above recited are the identical persons named in the said citation on appeal, and that I served said citation on appeal in my official capacity as the sheriff in and for the County of Colfax in the Territory of New Mexico.

Sheriff's fees, $2.00.
Paid.

MARION LITTRELL,
Sheriff in and for the County of Colfax,
in the Territory of New Mexico.

166 And because the foregoing matters are not all of record in said cause, the said Frank H. Jones, intervenor, prays that this bill of exceptions, containing the same may be signed, sealed and made a part of the record, which is accordingly done, this 18th day of April, A. D. 1908.

(Signed) WILLIAM J. MILLS,
Chief Justice, etc.

The foregoing record and bill of exceptions are signed, settled and sealed, as those upon which the foregoing cause may be heard in the Supreme Court of the Territory of New Mexico.

April 18th, 1908.

(Signed) WILLIAM J. MILLS,
Chief Justice, etc.

TERRITORY OF NEW MEXICO,
County of Colfax, ss:

I, Secundino Romero, clerk of the Fourth Judicial District Court for the Territory of New Mexico, sitting in and for the County of Colfax, do hereby certify that the above and foregoing, to which

this certificate is attached, contain a true and perfect transcript of the record, proceedings and papers in cause No. 2702, lately pending in said court, wherein J. van Houten was plaintiff, and Oro Dredging Company, was defendant, and Frank H. Jones, trustee, was intervenor, as the same remains of record and on file in my office.

Witness my hand and seal of said court this 18th day of April, 1908.

SECUNDINO ROMERO, *Clerk.*
[SEAL.] By E. G. TWITTY, *Deputy.*

167 And afterwards, on to wit: on the said the fifth day of May, A. D. 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is as follows, towit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant,
vs.
CHARLES SPRINGER.

Appeal from District Court, Colfax County.

Assignment of Errors.

And now comes Frank H. Jones, Trustee of the Oro Dredging Company, a bankrupt, appellant, herein, by his attorneys, Elmer E. Studley, and Scott, Bancroft & Stephens, and assigns error on the part of the court below in said cause as follows:

1st: The court erred in entering the order of May 1st, A. D. 1906, filed herein May 7, 1906, directing the sale of a certain mining dredge, levied upon by the writ of attachment in said cause No. 2702.

(*a*) There was no petition filed and presented to the Court, setting up the kind, nature and condition of said property.

(*b*) There was no hearing of testimony of witnesses as to such property.

168 (*c*) The property so ordered sold was not perishable property within the meaning of Section 2716 of the Compiled Laws of New Mexico, of 1897.

(*d*) The court had no jurisdiction to order a sale of said property before final judgment in the cause.

2nd. The court erred in finding:

(*a*) That on the first day of May, 1906, a petition was duly pre-

sented to the Judge of said Court for an order, directing the sale of said mining dredge so attached as aforesaid.

(b) That it was alleged as a ground therefor, that the said dredge was of a perishable nature and was liable to be diminished in value before the final adjudication of this cause.

(c) That testimony of witnesses was heard as to said dredge and the equipment thereof.

3rd: The court erred in finding that on the 17th day of July A. D., 1906, the sale of said dredge was, on the report of said Receiver, duly approved and confirmed.

4th: The court erred in failing to set aside and vacate said order of sale of May 1st, A. D., 1906.

5th: The court erred in finding that said dredge at the time of the application for the sale thereof and at the time of said order of sale, and at the time of the sale thereof, was of a perishable nature and liable to be lost and diminished in value before the final adjudication of this case.

6th: The court erred in finding that $5,000 was a fair and adequate price for the dredge and equipment aforesaid at the time of said sale in its then condition and situation.

7th: The court erred in concluding that the sale of said dredge and equipment and approval thereof, vested in said Charles Springer a good and perfect title thereto, free from any rightful claim on the part of said Frank H. Jones, Trustee.

169 8th: The court erred in awarding possession of said mining dredge and its equipment to Charles Springer.

9th: The court erred in failing to sustain the motion of Frank H. Jones, Trustee, entered herein on the 2nd day of August, A. D., 1906, to direct its Receiver, James K. Hunt, to turn over to said Frank H. Jones, Trustee, all the property of said Oro Dredging Company, which came into the possession of said Receiver and to enter an order, dissolving the attachment heretofore issued and levied in said cause.

10th: The court erred in sustaining the motion of said plaintiff, entered herein on the 3rd day of August A. D., 1906, to strike from the files the motion of Frank H. Jones, Trustee, entered herein on the 2nd day of August A. D., 1906.

11th: The court erred in entering the order of August 3rd A. D., 1906, sustaining the motion of the plaintiff in said cause to strike from the files the motion of said Trustee entered herein on the 2nd day of August, A. D., 1906.

12th: The court erred in striking from the files the motion of said Frank H. Jones, Trustee, entered herein on the 2nd day of August, 1906.

13th: The court erred in admitting illegal and incompetent evidence offered by said Charles Springer over the objection and exception of said Frank H. Jones, Trustee, intervenor.

14th: The court erred in finding said Charles Springer, prior to the time he purchased the dredge and equipment thereof, had no knowledge nor notice of any kind that proceedings of any nature or character whatsoever had been commenced in the District Court of

the United States, for the Northern District of Illinois, the purpose of which was to cause the defendant Company to be adjudicated a bankrupt.

15th: The court erred in finding that said Charles Springer was a bona fide purchaser of said mining dredge and equipment for value and acquired the same without notice or reasonable cause for inquiry as to whether or not there had been commenced pro-
170 ceedings in bankruptcy against said Oro Dredging Company.

16th: The court erred in failing to find that said sale vested no title in said Charles Springer.

17th: The court erred in failing to find that said Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, was entitled to the possession and control of said dredge, free and clear of any and all claims of said Charles Springer.

18th: The court erred in failing to dissolve said attachment and in failing to order the property affected thereby, turned over to said Frank H. Jones, Trustee of the Oro Dredging Company, a bankrupt.

19th: The court erred in denying the prayer of the petition of said Frank H. Jones, Trustee, in so far as it seeks an order, awarding possession of said mining dredge and its equipment, to him.

20th: The court erred in its opinion, because the same is contrary to the law and the facts.

Wherefore, appellant demands that the said judgment be reversed and the said cause remanded.

ELMER E. STUDLEY.
Of Raton, New Mexico;
SCOTT, BANCROFT & STEPHENS,
Of Chicago, Illinois,
Attorneys for Appellant.

Which said assignment of errors was and is endorsed on the back thereof as follows to wit: "No. 1232. Supreme Court of Territory of New Mexico. Frank H. Jones, Trustee, Intervenor, Appellant vs. Charles Springer, et al Appellee's Assignment of errors. Filed in my Office this May 5th 1908. Jose D. Sena, Clerk. Scott, Bancroft & Stephens, Attorneys at Law, The Temple."

And afterwards, on to wit, *on* the seventeenth day of May, A. D. 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a proof of service of Briefs
171 and record, which said proof of service of Briefs and record was and is in words and figures, following towit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

No. 1232.

FRANK H. *Hones*, Trustee in Bankruptcy of The Oro Dredging Company, Bankrupt, Intervenor, Appellant,

vs.

CHARLES SPRINGER, Appellee.

Appeal from District Court, Colfax County.

STATE OF ILLINOIS,
County of Cook, ss:

Joseph J. Kroupa, being first duly sworn, deposes and says that he served two copies of the transcript of the record in the above entitled cause and also two copies of the brief and argument, filed on behalf of the appellant in the above entitled cause, on Charles A. Spiess and Stephen B. Davis, Attorneys for appellees herein, and on J. Van Houten, one of the appellees herein, by depositing in the Post Office in the City of Chicago on the 2nd day of May, A. D., 1908, two printed copies of said transcript of the record and said briefs and arguments, enclosed in a wrapper, postage prepaid, addressed to said Charles A. Spiess and Stephen B. Davis, at East Las Vegas, New Mexico, and by depositing two printed copies of said transcript of the record and said briefs and arguments in the Post Office in the City of Chicago, on the 4th day of May, A. D. 1908, enclosed in a wrapper, postage prepaid, addressed to J. Van Houten at Raton New Mexico, that each of said parcels containing said transcripts and briefs were sent by registered mail and receipts given this affiant for the same by the postal authorities at the City of Chicago, which said receipts are hereto attached, made a part hereof and marked
172 Exhibits "A," "B," and "C"; that there had been returned to Scott, Bancroft & Stephens, Attorneys for said appellant, in whose behalf this affiant registered said parcels, containing said transcripts and briefs as aforesaid, the original receipts for each of said parcels, which said receipts are hereto attached, made a part hereof and marked Exhibits "D," "E" and "F."

JOSEPH J. KROUPA.

Subscribed and sworn to before me this 16th day of May, A. D. 1908.

CHARLES OWEN RUNDALL,
Notary Public.

EXHIBIT "A."

Registered Parcel No. 31698 P. O. Chicago, Ill.
Received May 2nd, 1908, of Scott, Bancroft & Stephens, a Parcel addressed to C. A. Spiess, E. Las Vegas, N. M.

POSTMASTER,
Per Mc.

EXHIBIT "B."

Register- Parcel No. 31699 P. O. Chicago, Ill.
Received May 2nd. 1908 of Do. A parcel/ addressed to S. B. Davis. E. Las Vegas, N. M.

POSTMASTER.
Per Mc.

EXHIBIT "C."

Register- Parcel No. 31789 P. O. Chicago, Ill.
Received May 4. 1908. of Scott Bancroft and Stephens, 500-184 La Salle, a parcel addressed to J. Van Houten, Raton N. M.

POSTMASTER.
Per C. B.

EXHIBIT "D."

Registry Return Receipt. Form No. 1548.

Received from the Postmaster at E. Las Vegas, N. M., Register-parcel No. 31698. From Post Office at Chicago, Ill. Addressed to Charles A. Spiess. Date May 5, 1908.

CHARLES A. SPIESS.
(Signature of name of addressee.)
By KATHERINE G. SULLIVAN. *Clerk.*
(Signature of addressee's agent.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

173 A registered article must not be delivered to any one but the addressee, except upon addressee's written order.

When above receipt has been properly signed, it must be postmarked with name of delivering office and actual date of delivery and mailed to its address without envelope or postage.

EXHIBIT "E."

Registry Return Receipt. Form No. 1548.

Received of Postmaster at E. Las Vegas, N. M., Registered Parcel No. 31699. From Post Office at Chicago Ill. Addressed to Stephen B. Davis. Date May 8, 1908.

STEPHEN B. DAVIS.
(Signature of name of addressee.)

_____.
(Signature of adressee's agent.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

A registered article must not be delivered to any one but the addressee, except upon addressee's written order.

When above receipt has been properly signed, it must be post-marked with the name of delivering office and actual date of delivery and mailed to its address without envelope or postage.

EXHIBIT "F."

Registry Return Receipt. Form No. 1548.

Received of the Postmaster at Raton N. Mex., Registered Parcel No. 31789 From Post Office Chicago Ill. Addressed to J. Van Houten. Date ——, 190-.

J. VAN HOUTEN.
(Signature or name of addressee.)

——— ———.
(Signature of addressee's agent.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

A registered article must not be delivered to any one but the addressee, except upon addressee's written order.

174 When above receipt has been properly signed, it must be post-marked with the name of delivering office and actual date of delivery and mailed to its address without envelope or postage.

Which said proff of service of Record and Briefs was and is endorsed on the back thereof as follows to wit:

"No. 1232—Supreme Court, Territory of New Mexico—Frank H. Jones Trustee, vs. Charles Springer—Proof of Service of Briefs and record—Filed in my office this May 17th, 1908, Jose D. Sena, Clerk—Scott, Bancroft and Stephens, Attorneys at Law, The Temple".

And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the First Monday in January A. D., 1908, on the twelfth day of the said regular term, the same being the 31st day of August A. D., 1908 the following among other proceedings were had and entered of record to-wit:

No. 1232.

F. H. JONES, Trustee, etc., Appellant,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Colfax County.

It is ordered by the court that this cause be and the same hereby is continued for the term.

And Afterwards, on to wit: at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe the seat of government, on the first Wednesday after the first Monday in January A. D., 1909, on the fourth day of the said regular term, the same being the eleventh day of January A. D., 1909, the following among other proceedings were had and entered of record as follows, towit:

175 No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Co., Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Colfax County.

It is ordered by the court that Mr. J. E. MacLeish, be and he hereby is admitted to the bar of this court for the purposes of this case.

And Afterwards, on to wit, *on* the fourth day of the said regular term, the same being the *same being the* eleventh day of January, A. D., 1909, the following among other proceedings were had and entered of record, following to wit:

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Co., a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Colfax County.

This cause coming on for hearing upon the transcript of record, assignment of errors and brief of counsel, is argued by J. F. MacLeish, Esq., for appellant and Charles A. Spiess, Esq., for appellee, and submitted to the court, and the court not being sufficiently advised in the premises takes the same under advisement.

And Afterwards, on to wit, at the said regular term, on the seventh day thereof, the same being the fifteenth day of January A. D., 1909, the following among other proceedings were had and entered of record, following to wit:

176 No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Co., a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Colfax County.

It is ordered by the court that the appellee herein be and he hereby is granted twenty days from this date to file supplemental briefs and that the appellant be and he hereby is granted twenty days thereafter to reply.

And Afterwards, on to wit, *on* the twelfth day of the said regular term, the same being the first day of July, A. D. 1909, the following among other proceedings were and entered of record, following to wit:

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Co., a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Colfax County.

This cause having been argued by counsel, submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Edward A. Mann, Associate Justices Parker, McFie, Abbott and Pope, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Colfax, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith it is considered and adjudged by the court that the lien of the said attachment be and it is hereby vacated and dissolved, and the sheriff
177 of Colfax County is hereby ordered and directed to deliver over the possession of the real estate which he, the said sheriff, is holding by virtue of said writ of attachment, to the said Frank H. Jones, Trustee, and It is further considered and adjudged by the court that the petition of the said Frank H. Jones, Trustee, in so far as it seeks an order directing that said Frank H. Jones, Trustee,

be awarded possession of said mining dredge and its equipment, be and it is hereby denied, and it is considered and adjudged that the said Charles Springer go hence without day.

And Afterwards, on to wit: *on* the eighth day of September, A. D. 1909, there was filed in the office of the Clerk of the Supreme Court a petition to the Honorable, The Supreme Court of the United States, for an appeal from the judgment and decree of the Supreme Court of the Territory of New Mexico in the above entitled cause, which said petition for an appeal was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1232.

FRANK H. *HONES*, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

To the Honorable the Supreme Court of the United States:

Your petitioner, Frank H. Jones, of the City of Chicago, County of Cook and State of Illinois, suing as Trustee in Bankruptcy of the Oro Dredging Company, Appellant in the above entitled cause, respectfully represents to the court as follows:

178 That he is the duly appointed and qualified Trustee in Bankruptcy of the Oro Dredging Company, a corporation organized under the laws of the State of Illinois, and that the said corporation, for the greater portion of six months next preceding the 12th day of March, 1906, had its principal place of business at the City of Chicago, in the County of Cook and State of Illinois, and in the Eastern Division of the Northern District of Illinois, and that during said period, said corporation had been, and that upon the said 12th day of March, 1906 was engaged principally in mining and mercantile pursuits.

Your petitioner further represents that on or about the 12th day of March A. D., 1906, a petition in bankruptcy was filed in the District Court of the United States, for the Eastern Division of the Northern District of Illinois, by three creditors of said Oro Dredging Company, having provable claims amounting in the aggregate in excess of securities held by them to the sum of $500, and that the said Oro Dredging Company then owed debts to the amount of $1,000; that said petition prayed that the said Oro Dredging Company be adjudged a bankrupt within the purview of the Acts of Congress relating to bankruptcy; that thereafter, to-wit; on or about the 23rd day of April A. D., 1906, such proceedings were had upon said petition in the United States District Court, in and for the Eastern Division of the Northern District of Illinois that the said Oro Dredging Company was by order duly entered in said bankruptcy

proceedings, adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy; that thereafter such proceedings were had in said bankruptcy court that your petitioner was, by an order duly entered in said bankruptcy proceedings, appointed Trustee of said Oro Dredging Company, a bankrupt, and on or about the 16th day of July A. D., 1906, he duly qualified as such Trustee by filing his bond, as required by said court, and that said Bond was, on the said last mentioned date, by an order that day entered in said proceedings, duly approved by said court;
179 that at the date of the filing of said petition in bankruptcy and at the date of the adjudication of bankruptcy thereon, as above set forth, the said bankrupt, Oro Dredging Company was the owner of a certain mining dredge, together with its equipment, material and apparatus thereto attached, together with certain real estate constituting a mining claim, situated in the County of Colfax, in the Territory of New Mexico.

Your petitioner further represents that on or about the 23rd day of February A. D., 1906, one J. Van Houten sued out a writ of attachment in the District Court of the Fourth Judicial District of the Territory of New Mexico, sitting in and for the County of Colfax, in the cause entitled J. Van Houten vs. The Oro Dredging Company, in said court, and that said writ of attachment was levied upon the property of said the Oro Dredging Company, hereinabove described, on or about the 27th day of February, A. D., 1906, and was returned to said Territorial Court on the same day; that no personal service of process upon said defendant the Oro Dredging Company was had in said cause; that subsequent thereto, to-wit; on or about the 9th day of March, 1906, an order was entered in said attachment proceedings, appointing one James K. Hunt as Special Receiver of said mining dredge, upon which said writ of attachment was so levied as aforesaid; that on or about the 1st day of May A. D., 1906, an order was entered in said attachment proceedings, directing the said James K. Hunt, as Special Receiver, to sell said dredge, and that said James K. Hunt did, pursuant to said order and on or about the 26th day of June, A. D., 1906, sell said dredge to one Charles Springer of the County of Colfax, Territory of New Mexico, for the sum of $5,000.

Your petitioner further represents that thereafter, to-wit; on the 2nd day of August A. D., 1906, he filed in said attachment proceedings, as Trustee in Bankruptcy of the Oro Dredging Company, Bankrupt, his appearance and moved the court in said cause to dissolve the attachment heretofore issued and levied upon the property of said bankrupt; and also for an order upon said Receiver so appointed by said Territorial Court, directing him to turn over
180 to said Trustee all the property which came into his possession as such Receiver; that on the 3rd day of August A. D., 1906, there was filed in said cause, on behalf of said plaintiff, and said Receiver, a motion to strike from the files the motion of said Trustee. An order was then entered upon the 3rd day of August A. D., 1906, by said Territorial Court, sustaining the motion of said plaintiff and said Receiver, and the motion of your petitioner, as Trustee in Bank-

ruptcy, was thereupon by said Court, stricken from the files; that on the 4th day of August, A. D., 1906, a motion was made by your petitioner as Trustee in Bankruptcy of said the Oro Dredging Company, a Bankrupt, for leave to file his intervening petition in said cause, and an order was entered on the same date, granting leave to the petitioner as Trustee of said Oro Dredging Company, a bankrupt, to file his intervening petition therein; that thereafter and on, to-wit; the 4th day of August A. D., 1906, your petitioner filed, as Trustee in Bankruptcy of the said Oro Dredging Company, an intervening petition in said cause. It was alleged in said petition that your petitioner, as such Trustee, had an interest in the matter in litigation; that he was duly authorized by the United States District Court, in and for the Northern District of Illinois, to intervene in said cause; that the Oro Dredging Company was insolvent on the date of the bringing of said attachment suit; that by virtue of the Acts of Congress relating to bankruptcy, the said Frank H. Jones, as Trustee, became vested by operation of law, with the title of said Bankrupt as of the date it was adjudged a Bankrupt, to-wit; April 23rd, 1906, of all the property of said Bankrupt wherever situated; that no title passed by the sale of the said dredge, to said Charles Springer on the 26th day of June, 1906, by virtue of said order of sale, of May 1st 1906; that the lien of attachment in said cause became null and void and the property affected by the sale, passed to said Trustee, wholly released and discharged from the same, and that your petitioner was entitled to the possession and control of all
181 of the said property, free and clear of any lien by reason of the said attachment, or any sale had thereunder.

It was further alleged that said Charles Springer was not a bona fide purchaser for value; that the order of May 1st, 1906, for the sale of the said dredge was improvidently granted and conferred no authority upon the said Receiver to sell the same; that the order should be set aside and said pretended sale vacated, said attachment dissolved, and the possession of said dredge and all property attached in said cause should be turned over to said intervening petitioner, as Trustee of the said Oro Dredging Company, a bankrupt; that at the time of said alleged sale, said plaintiff, J. Van Houten, said Receiver, James K. Hunt, and the said Charles Springer, and each of them, had notice of the said pendency of said bankrupt proceedings and reasonable cause for inquiry; that the said dredge was worth upwards of the sum of $10,000, and that the price at which said dredge is claimed to have been sold, is grossly inadequate, and that the said Charles Springer was not a bona fide purchaser of said dredge for value. It was prayed in and by said petition that said order of May 1st, 1906, be set aside and said pretended sale vacated and the attachment dissolved; that the property affected thereby be turned over to said Trustee and for such other and further relief as to the court should seem meet and proper. There was attached to said intervening petition, as exhibits, certified copies of the orders adjudging said Oro Dredging Company a Bankrupt, appointing said Frank H. Jones, Trustee therein, approving the bond of said Trustee filed in said Bankruptcy proceedings, and authorizing said Trus-

tee to intervene in said cause. Thereafter, on August 18th, 1906, service of said intervening petition, together with the exhibits, order and notice was had upon said Charles Springer, the purchaser of said dredge and on August 22nd, 1906, a general demurrer to said petition was filed by said plaintiff. The demurrer was thereafter sustained and leave was granted to said Trustee to file an amended intervening petition. An amended intervening petition of your petitioner, as such Trustee, was then filed in said cause on Sep-
182 tember 22, 1906. It set up in addition to the allegations of the original intervening petition, the jurisdictional facts appearing in said petition in bankruptcy; that the plaintiff, J. Van Houten, was scheduled as a creditor of said estate; that the dredge was a ponderous piece of machinery of wood and iron and was not perishable property, within the meaning of the statute of the Territory of New Mexico, relating to the sale of perishable property before judgment, and prayed for the same relief as set up in said original intervening petition. A demurrer was thereafter filed to said amended intervening petition, on behalf of the plaintiff in said attachment proceedings, on the 6th day of October, A. D 1906, and on the 9th day of February A. D., 1907, said demurrer was overruled. The plaintiff was ordered to plead or answer to said amended intervening petition within thirty (30) days from said 9th day of February A. D., 1907, and on the 9th day of October A. D., 1907, Charles Springer, the purchaser of said dredge, filed an answer to said amended intervening petition. It was alleged in said answer that he had no knowledge or information as to whether the allegations as to the proceedings had in said bankruptcy proceedings before the United States District Court, for the Northern District of Illinois, as hereinabove set out, were true or false; it denied that said Trustee became, by operation of law vested with the title of the Oro Dredging Company, as of the date it was adjudged a bankrupt of the property of said bankrupt; it admitted the proceedings had in said cause, but denied that said Charles Springer had notice of the pendency of said Bankruptcy proceedings, or had reasonable cause for inquiry; it denied that the dredge was worth upwards of $10,000 and that the price for which the same was sold to said Springer was grossly or otherwise inadequate and that he was not a bona fide purchaser of said dredge for value.

For an affirmative defense he set up his title to said dredge under order appointing a receiver, the order of sale, publication had thereon, and the report of said receiver.

There was thereafter filed in said cause on the 24th day of Octo-
ber A. D., 1907, a general reply by your petitioner as such
183 Trustee, to the answer of said Springer, denying the sufficiency of the said answer and offering to maintain and prove the matters and things set up in said amended intervening petition.

Your petitioner further shows that on the 2nd day of January A. D., 1908, a decree was made and entered in said cause, whereby it was adjudged and decreed that the sale of the said dredge and the

equipment and approval thereof, vested in the said Charles Springer, a good and perfect title, free from any rightful claim in the part of the said Frank H. Jones, Trustee as aforesaid; that the writ of attachment in said cause having been levied on the real estate of the defendant company, within four months prior to the filing of the petition in bankruptcy against it, and no rights of bona fide purchasers having intervened, the lien thereof was vacated and dissolved by the said adjudication of bankruptcy; that the lien of the said attachment be vacated and dissolved and the said Sheriff of Colfax County was ordered and directed to deliver over the possession of said real estate to said Frank H. Jones, Trustee/ that the petition of said Frank H. Jones, Trustee, in so far as it seeks an order directing that said Trustee be awarded possession of the said mining dredge and its equipment, be denied, and that said Charles Springer go hence without bail.

Your petitioner further shows that thereafter, towit; on the 17th day of February A. D., 1908, an application for an appeal to the Supreme Court of the Territory of New Mexico, from the judgment of said District Court was made and an order was thereafter entered on the 21st day of February A. D., 1908, granting an appeal to said Supreme Court and requiring said Frank H. Jones, Trustee, to execute a good and sufficient appeal bond, to pay all costs for which said Trustee should become liable on such appeal; that thereafter, on the 26th day of February, A. D., 1908, an appeal bond was duly filed and approved in said cause and a citation issued to said J. Van Houten and Charles Springer, to answer said appeal and to show cause, if any there be, why said judgment and decree should not be corrected and speedy justice not be done to the parties
184 in this behalf; that thereafter, to-wit; on the 1st day of July A. D., 1909, an opinion was rendered and judgment entered in this cause by said Territorial Supreme Court, affirming the decree of said trial court.

Wherefore, your petitioner feeling aggrieved hereby appeals from said decree of the said Supreme Court of the Territory of New Mexico and from the whole thereof and prays this Honorable Court that the said decree and the pleadings and all evidence, mandates, orders, transcripts and other proceedings had in said cause, may be sent to the Supreme Court of the United States, to the end that your Honorable Court may hear the said cause anew; that the said decree, and each and every part thereof, may be reversed and that a decree be made granting the relief prayed for by said Frank H. Jones, Trustee, in Bankruptcy of the Oro Dredging Company, a Bankrupt, in his intervening petition filed in said cause, or that such other decree may be made as to your Honorable Court shall seem just and proper.

And your petitioner further prays, that said appeal may be allowed to your petitioner, without bond, in accordance with the true intent of the statute in such cases made and provided, with the re-

quest that a supercedeas may be issued herein, without bond, as in such cases by statute made and provided.

FRANK H. JONES,
Trustee of the Oro Dredging Company, a Bankrupt.
By SCOTT, BANCROFT AND STEPHEN,
His Solicitors.

ELMER E. STUDLEY,
Of Counsel.

Dated September 1st, A. D. 1909.

Which said petition for an appeal was and is endorsed on the back thereof, as follows, to-wit:

185 "No. 1232—In the Supreme Court of the Territory of New Mexico.—Frank H. Jones Tr. in Bnkr. of the Oro Dredging Co. a Bnkr.? Appellant vs. Charles Springer, Appellee.—'Petition for appeal'—Filed in my office this Sept. 8th, 1909, Jose D. Sena, Clerk. Elmer E Studley Scott Bancroft & Stephens, Attorneys at Law, Corn. Exchange Bank Building."

And afterwards, on to wit, on the said the eighth day of September, A. D., 1909, there was filed in the office of the Clerk of the said Supreme Court of the Territory of New Mexico an affidavit of value in the above entitled cause, which said affidavit of value, was and is in words and figures following to-wit:

In the Supreme Court of the Territory of New Mexico.

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, being first duly sworn, deposes and says that he is a resident of the city of Chicago, county of Cook and state of Illinois; that he is the appellant in the above entitled cause and that the matter in dispute in said cause, exclusive of all costs, exceeds the sum of five thousand dollars ($5,000).

FRANK H. JONES.

Subscribed and sworn to before me this 2nd day of September, A. D. 1909.

WILLIARD DIXON,
Notary Public.

Which said affidavit of value, was and is endorsed on the back thereof, as follows to wit:

186 "No. 1232.—In the Supreme Court of the Territory of New Mexico.—Frank H. Jones, Tr. in Bankcy. of the Oro Dredging Co. a Bankpt. Appellant, vs. Charles Springer, Appellee.—'Affidavit of Value'—Filed in my office this Sept. 8th. 1909. Jose D. Sena, Clerk,—Elmer E. Studley, Scott, Bancroft & Stephens, Attorneys at Law, Corn. Exchange Bank Building."

And afterwards, there was filed and entered of record in the office of the clerk of the Supreme Court of the Territory of New Mexico, an order granting an appeal in the above entitled cause, which said order granting an appeal was and is in words and figures, following towit:

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

This matter having come on to be heard upon the application of Frank H. Jones, as Trustee in Bankruptcy, Appellant in the above entitled cause, by Elmer E. Studley, and Scott, Bancroft & Stephens, his attorneys, for an appeal to the Supreme Court of the United States, from the judgment rendered herein on the first day of July, A. D. 1909 by the Supreme Court of the Territory of New Mexico, affirming the judgment and decree herein rendered and made and entered on the 30th day of December, A. D., 1907, by the District Court of the Territory of New Mexico, sitting within and for the County of Colfax, in said Territory, and after due consideration thereof, and the court being fully advised and informed in the premises, and having deliberated thereon;

It is therefore ordered, adjudged and decreed, that the appeal prayed for as aforesaid, be and the same is hereby allowed
187 without bond, as in such cases, by statute, made and provided;

And it is further hereby ordered, adjudged and decreed, That the appeal hereby allowed shall stand as a supercedeas in said cause without bond, as by statute, in such cases made and provided.

Done this 3rd day of September A. D., 1909.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Whish said order allowing an appeal was endorsed on the back thereof as follows to wit:

"Frank H. Jones, Appellant vs. Charles Springer, Appellee—(Order allowing appeal.) Filed in my office this Sept. 8, 1909. Jose D. Sena Clerk.—Elmer E. Studley, Scott, Bancroft and Stephens, Attorneys at Law, Corn. Exchange Bank Building."

And afterwards, on to wit the 8th day of September A. D., 1909, there was filed in the office of the said clerk of the Supreme Court of the Territory of New Mexico, a citation in the above entitled cause, which said citation was and is in the *following* words and figures following to wit:

In the Supreme Court of the Territory of New Mexico.

1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

The President of the United States to Charles Springer, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within sixty (60) days from the date of this writ pursuant to an appeal duly allowed from the Supreme Court of the Territory
188 of New Mexico on the third day of September, A. D., 1909, in a cause wherein Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant, as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this third day of September A. D., 1909.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the within citation is hereby admitted this 8th day of September, A. D., 1909.

CHARLES A. SPIESS,
Attorney for Appellee.

Which said citation was and is endorsed on the back thereof, as follows to wit: "No. 1232.—In the Supreme Court of the Territory of New Mexico. Frank H. Jones, Tr. in Bankr., of the Oro Dredging Co. Bankr. Appellant vs. Charles Springer, Appellee. 'Citation' Filed in my office this Sept. 8, 1909. Jose D. Sena, Clerk.—Elmer E. Studley, Scott, Bancroft & Stephens, Attorneys at Law, Corn. Exchange Bank Building."

And afterwards, on to wit*h on* the said the eighth day of September, A. D., 1909, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of error in said appeal above prayed for, which said assignment of errors was and is in words, following to wit:—

189 In the Supreme Court of the Territory of New Mexico.

No. 1232.

FRANK H. JONES Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant,

vs.

CHARLES SPRINGER, Appellee.

Now comes Frank H. Jones, Trustee of the Oro Dredging Company, a Bankrupt, appellant herein, by his attorneys, Elmer E. Studley and Scott, Bancroft & Stephens, and shows that in the record and proceedings, and in rendering the judgment of the Supreme Court of the Territory of New Mexico, affirming the decree and judgment of the District Court of December 30th, 1907, there is manifest error:

(1) The Supreme Court of the Territory of New Mexico erred in affirming the decree and judgment of the District Court entered on December 30th, 1907.

(2) The Supreme Court of the Territory of New Mexico erred in refusing to reverse the decree and judgment of the District Court entered on December 30th, for the following reasons:

First. The said decree and judgment of the District Court entered December 30th, 1907, is erroneous in that the said District Court had no jurisdiction to enter the order of May 1st, 1906, entered by said District Court and filed in said cause May 7th, 1906, directing the sale of said mining dredge, levied upon by the writ of attachment in said cause, and that said District Court had no jurisdiction to order a sale of said property before final judgment in the cause in that said property is not perishable property within the meaning of Section 2716 of the Compiled Laws of New Mexico, of 1897, and there was no hearing of testimony of witnesses as to such property upon a petition duly presented to the Judge of said Court for an order directing the sale of said property, in accordance with the provisions of said Section 2716 of the Compiled Laws of New Mexico.

190 Second. Said decree is erroneous in that it finds that on the 17th day of July, A. D. 1906, the sale of said dredge was on the report of said receiver, duly approved and confirmed, whereas it should have found that no report of said receiver was presented to said court and no order entered in said cause, approving or confirming said sale.

Third. Said decree is erroneous in that it affirms said order of said — of May 1st, 1906, whereas it should have found that said order of May 1st, 1906 was erroneous and was entered without jurisdiction of said court, and should have vacated and set aside the same.

Fourth. Said decree is erroneous in that it finds that said dredge at the time of the application for the sale thereof, and at the time of said order of sale, was of a perishable nature and liable to be lost and diminished in value before the final adjudication of said cause,

whereas it should have found that said dredge is a large boat constructed of wood, iron and steel and was preserved and maintained by that care which such material requires, and was at the time of the entry of said decree, held in fact and preserved.

Fifth. Said decree is erroneous in that it finds that $5,000 was a fair and adequate price for said dredge and its equipment at the time of said sale, in its then condition and situation, whereas it should have found that said dredge was worth a sum upwards of $10,000.

Sixth. Said decree is erroneous in that it finds that the sale of said dredge and its equipment to Charles Springer, vested in him a good and perfect title thereto, free from any rightful claim on the part of said Frank H. Jones, Trustee, and that said Charles Springer was a bona fide purchaser of said dredge and its equipment for value and acquired the same without notice or reasonable cause for inquiry, as to whether or not there had been commenced proceedings in bankruptcy against said Oro Dredging Company, whereas it should have found that said sale vested no title in said Charles Springer,
191 and that said Frank H. Jones, Trustee in Bankruptcy, was entitled to the possession and control of said dredge, free and clear of any and all claims of said Charles Springer, in that the sale of said dredge to said Springer was had subsequent to the entry of the order of adjudication in said bankruptcy proceedings, and that such purchaser is therefore, not a bona fide purchaser for value without notice, as contemplated in and by Section 67*f* of the National Bankruptcy Act of 1898.

Seventh. Said decree is erroneous in that it finds that there can be a valid sale of the assets of a bankrupt in another proceeding pending in a State or Territorial Court, subsequent to the entry of the order of adjudication in said bankruptcy proceeding, whereas it should have found that the bankruptcy proceedings are in rem and notice to all the world, and there cannot be a valid sale of the assets of a bankrupt subsequent to the entry of the order of adjudication except by the Trustee in Bankruptcy, that under the Acts of Congress relating to Bankruptcy, the lien of attachment in said attachment proceedings, was made null and void upon the filing of the petition in bankruptcy, and the property affected thereby, passed to the Trustee as a part of the estate of the bankrupt, wholly discharged and released from the same.

Eighth. Said decree is erroneous in that it denied the prayer of the petition of said Frank H. Jones, Trustee, whereas it should have dissolved said attachment and vacated said order of sale and awarded the possession of said dredge and its equipment to said Trustee.

Ninth. Said decree is erroneous in that it sustains the order entered in said cause on August 3rd, 1906, striking from the files the motion of said Trustee, entered in said cause on August 2nd, 1906, to direct said James K. Hunt, Receiver, to turn over to said Trustee, all of the property of said Oro Dredging Company which came into his possession, and to enter an order dissolving said attachment issued and levied in said cause, whereas it should have found that said order of August 3rd, 1906, was erroneous and that an
192 order should have been entered on said day, dissolving said attachment and directing said Receiver to turn over to said

Trustee all of the property of said Oro Dredging Company, which came into his possession.

Tenth. Said decree is erroneous in that the construction of said Section 2716 of the Compiled Laws of New Mexico, in and by said decree, is erroneous in that it construes said Section as intended to provide for two contingencies (2) When goods are perishable in their nature; (*b*) When they are liable to be lost or diminished in value before the final adjudication of the case, and that it is the intention of the Legislature that the question of what property or class of property might be ordered sold under said section 2716, is by said Section left to the discretion of the Judge or court in each particular case, whereas the true construction of said Section is that the Legislature intended in and by said Section that only such property could be sold thereunder as was perishable in its nature when such property was liable to be lost or diminished in value, before the final adjudication of the case.

Eleventh. Said decree is erroneous in that the construction of Section 67*f* of the National Bankruptcy Act of 1898 is erroneous in that it construes said Section as intended to provide, that there may be a sale of said bankrupt's property under said Section 2716 of the Compiled Laws of New Mexico, subsequent to the entry of the order of adjudication in said bankruptcy proceedings, whereas it should have found that there can be no sale of said bankrupt's property under said Section 2716 either of perishable property, as therein defined, or of any other property of any nature or description, subsequent to the entry of the order of adjudication in bankruptcy, except by the Trustee in bankruptcy, in that all of said property, upon the entry of the order of adjudication, is brought within the custody and control of the Bankruptcy Court, wherever
193 situated, and can only be sold in accordance with the provisions of the Bankruptcy Act of 1898, and the amendments thereto.

Twelfth. Said decree is erroneous in that the trial court admitted illegal and incompetent evidence offered by said Charles Springer over the objection and exception of said Frank H. Jones, Trustee, intervenor, in said cause, in that said Charles Springer was permitted to testify in substance as follows:

That the amount he bid and paid for said dredge to said James K. Hunt, was a fair and adequate price for said property at the date of sale; that he, the said Charles Springer, prior to and at the time he purchased the same, had no knowledge or notice that proceedings of any nature or character whatsoever had been commenced at Chicago, Illinois, or any other place, to adjudge the said the Oro Dredging Company a bankrupt, and was not informed of the fact that such proceedings were had until two months after his said purchase; that he had no notice of any kind, or character, prior to or at the time of said purchase, that said the Oro Dredging Company was insolvent, or that proceedings had been commenced, or were pending, which had for their purpose the securing of an order, adjudging said Oro Dredging Company a bankrupt, all of which said evidence was objected to by appellant on the ground that said Springer was not qualified to

testify to the value of said property and that the balance of said evidence was incompetent and immaterial.

(13) The Supreme Court of the Territory of New Mexico erred in its judgment entered herein, in denying the petition of said appellant in so far as it seeks an order directing that said appellant be awarded possession of said mining dredge and equipment.

(14) The Supreme Court of the Territory of New Mexico erred, in that the opinion of said court and its judgment entered herein, finds that the said District Court had jurisdiction to order a sale of said dredge, under section 2716 of the Compiled Laws of New Mexico of 1897, whereas it should have found that said District Court had no jurisdiction to sell said dredge subsequent to the entry of the order of adjudication in said bankruptcy proceedings.

194 (15) The Supreme Court of the Territory of New Mexico erred in its opinion and its judgment entered herein, in that it found that the sale of said dredge and its equipment conferred title to said dredge and its equipment in Appellee, and that said Appellee was a bona fide purchaser for value without notice or reasonable cause for inquiry within the meaning of the proviso to section 67*f* of the bankruptcy Act of 1898, whereas it should have found that said sale vested no title in said Appellee as against the title and claim of said Appellant, in that said sale was had subsequent to the entry of the order of adjudication in said bankruptcy proceedings.

(16) The Supreme Court of the Territory of New Mexico erred, in its opinion and the judgment entered herein, in that it found that there may be a sale under section 2716 of the Compiled Laws of New Mexico of 1897, of property of the description and character of said dredge and its equipment, and of said dredge and its equipment, whereas it should have found that said dredge and its equipment, is not such property as might be sold under said section 2716 of the Compiled laws of New Mexico of 1897, and that said dredge and its equipment is not perishable property within the meaning and intent of said section 2716 and the laws of New Mexico.

(17) The order of sale of May 1st, 1906, and entered in said cause on May 7th, 1906, is erroneous, in that the district court had no jurisdiction to enter said order subsequent to the entry of the order of adjudication in said bankruptcy proceedings.

Wherefore, Appellant demands that said judgment be reversed and the said cause remanded.

FRANK H. JONES,
Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant.
By ELMER E. STUDLEY, *of Raton, N. M.*,
SCOTT, BANCROFT & STEPHENS,
Of Chicago, Illinois,
Attorneys for said Appellant.

195 which said assignment of errors was and is endorsed on the back thereof as follows to wit:

"No. 1232.—In the Supreme Court of the Territory of New Mexico—Frank H. Jones, Trustee in Bankruptcy of the Oro Dredg-

ing Company vs. Charles Springer, 'Assignment of Errors'—Filed in my office this Sept. 8th, 1909. Elmer E. Studley, Scott, Bancroft & Stephens, Attorneys at Law, Corn. Exchange Bank Building.

And Afterwards, on towit on the said the eighth day of September A. D., 1909, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a precipe for a transcript in the above entitled cause, which said precipe for a transcript was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Precipe.

To Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico:

Please prepare a transcript of the record in the above entitled cause for an appeal to The Supreme Court of the United States, which transcript shall include all journal or docket entries in said cause a complete transcript of all records, proceedings, papers upon which the order, decree and judgment of the above named court was made. Attached to said transcript thus prepared — you — certificate of aut-entication and transmit this record so that the same may be in the hands of the Clerk of the Supreme Court of the United
196 States at Washington D. C. within sixty days from the third day of September, A. D. 1909.

ELMER E. STUDLEY, *Raton, N. M.*,
SCOTT, BANCROFT & STEPHENS,
Chicago, Ill.,
Attorneys for Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant.

which said precipe was and is endorsed on the back thereof, as follows to wit: "No. 1232.—In the Supreme Court of the Territory of New Mexico,—Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Appellant, vs. Charles Springer, Appellee. Filed in my office this Sept. 8, 1909. Jose D. Sena, Clerk.—Elmer E. Studley, Attorney for Appellant, Raton N. M.

197 And afterwards, on towit on the 8th day of January A. D., 1910 there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a Notice, Motion and proposed

statement of facts by the appellant in the above entitled cause which said notice motion and proposed statement of facts, was and is in the following words and figures to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1909.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Fourth Judicial District, County of Colfax.

Now comes Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, Bankrupt appellant in the above entitled cause, and moves the court to find a statement of facts of the case in the nature of a special verdict, in accordance with section 2 of an Act concerning the practice in the Territorial Courts and appeal therefrom: A copy of said proposed statement of facts is herewith attached and made a part thereof.

FRANK H. JONES,
Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Pending.
By ELMER E. STUDLEY,
SCOTT, BANCROFT AND STEPHENS,
His Attorneys.

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1909.

198 FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant.
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Fourth Judicial District, County of Colfax.

Notice.

To Charles A. Spiess, Attorney for Appellee:

Please take notice that we have filed on behalf of the appellant in the above entitled cause, a motion for a finding by the Court, of a statement of facts of the case in the nature of a special verdict, a true copy of said motion and proposed statement of facts is herewith served upon you.

Further, please take notice that we shall present said motion to

said court at its next session to be held in the city of Santa Fe on the 28th day of February, 1910, at the opening of the court on said date or as soon thereafter as counsel can be heard, at which time and place you may appear as you see fit.

ELMER E. STUDLEY,
SCOTT, BANCROFT AND STEPHENS,
Attorneys for said Appellant.

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Fourth Judicial District, Colfax County.

A Statement of Facts of the Case in the Nature of a Special Verdict, in Accordance with Section 2 of an Act Concerning the Practice in the Territorial Courts and Appeal Therefrom.

This matter having come on to be heard upon the application of the appellee herein for a statement of the facts of the case in the nature of a special verdict, and the court being fully advised in the premises doth find:

199 1. That the Oro Dredging Company, a corporation organized and existing under the laws of the State of Illinois was formerly engaged in placer mining in Moreno Creek near Elizabethtown, New Mexico, and maintained its principal office in the city of Chicago, County of Cook and State of Illinois; that on or about September 11, 1905, it executed its certain promissory note payable to the order of the First National Bank of Raton, in the sum of $5,000, and thereafter, on or about the 10th day of February, 1906, it executed its certain other promissory note in the sum of $1,592.94, payable to the order of the same bank. These notes were subsequently assigned and transferred to J. Van Houton, who was the joint maker on each of said notes with the said Oro Dredging Company. On February 23, 1906, J. Van Houton filed his complaint in the District Court, within and for the County of Colfax, in the Territory of New Mexico, against the Oro Dredging Company to recover against the said defendant the sums of money evidenced by said notes as aforesaid; that upon affidavit and bond duly filed in said cause a writ of attachment was issued by the Clerk of said Court on said 23rd day of February, 1906, and duly executed on the 27th day of February, 1906, by the Sheriff of Colfax County, New Mexico, by levying upon a certain mining dredge, together with tools, machinery, and other property used in connection therewith, and certain real estate, situated in said County, all said property—real estate and personal—then being the property of the Oro Dredging Com-

pany, defendant herein, and formerly used by it in its said business; that said mining dredge and its equipment together with said lands and tenements were upon said last mentioned date the properties of said Oro Dredging Company, the defendant in said attachment suit, and constituted the mining properties and claim of said defendant.

2. That on the 21st day of March, 1905, a motion was made in said attachment suit by plaintiff's counsel for the appointment of a receiver, to take into his possession that certain mining dredge, together with its equipment, levied upon by said Sheriff. In support of this motion, there was filed in said cause, the affidavit of
200 the plaintiff, J. Van Houton, in which it was stated that said dredge was surrounded by water and mud and at almost any time heavy water might come down the stream of water in which the dredge was operated and capsize it and do other further material injury; that there should be work done to minimize this danger; that the dredge, if repaired, could be operated and the danger from high water obviated. And in further support of this motion, the affidavit of George B. Downey was offered, in which affidavit it was stated that the dredge was located in Merino Creek, near Elizabethtown, in the county of Colfax that the matter which required immediate attention was the danger of high water coming down the creek, resulting from the melting snow in the mountains; that the dredge had heretofore been started to work before high water came; that said high water might come at any time, and that if it did come, it would fill up around the dredge and damage the same; that a large ditch should be cut to carry away the high water and the dredge should be repaired.

That on said last mentioned date James K. Hunt, was duly appointed by said District Court as Receiver for the purpose of holding and conserving the said mining dredge and other property appurtenant thereto and used in connection therewith, and said Receiver was directed by this Court to give notice to each of the Stockholders of said Oro Dredging Company, of his appointment as such Receiver, which notice he gave so far as he could ascertain the names of such stockholders.

3. That on the 1st day of May, 1906, the District Court ordered the said receiver, James K. Hunt, to sell said dredge and equipment, and directed that said sale should be made at public auction at the City of Raton, at the front door of the Court House, after thirty days' notice of the time and place of such sale, by publication once each week for four successive weeks, in the Raton Range, a newspaper published in said city of Raton, and that such sale should be made to the highest bidder for cash thereat; that said receiver caused the publication to be duly made as provided in said order, and upon the completion thereof, and on the 26th day of June, 1906,
201 offered for sale to the highest bidder, for cash, at the place specified in said order, the said dredge and equipment.

4. That at the sale aforesaid Charles Springer was the highest and best bidder for the property aforesaid, bidding the sum of five thousand dollars ($5,000) in cash therefor, and said Receiver thereupon sold the said dredge and equipment to said Charles Springer, taking

in payment therefor the said sum of Five thousand dollars ($5,000), which said sum less certain costs and expenses, was thereupon by said Receiver paid into said District Court, and is still held by the Clerk of said Court; that said Charles Springer took possession of said dredge and equipment under the sale aforesaid and was in actual possession of said dredge and equipment under the sale aforesaid at the time of the trial of this cause, and that he has expended the sum of $1,544.90 for insurance and repairs of said dredge, claim, ditches and head gates since his said purchase.

5. That said mining dredge is a large boat constructed of wood, iron and steel, equipped with machinery, tools and appliances for dredging, elevating, washing, and extracting gold from placer dirt and gravel; that said boat is afloat upon an artificial lake or pond alongside the Moreno River or Creek, about half a mile from Elizabethtown, in Colfax County, New Mexico; that the water to keep said pond at the proper level to float said dredge was obtained from a ditch leading from said creek, and the said dredge was operated by moving the same around upon said pond, and working a large number of iron and steel buckets weighing upwards of one thousand pound each, attached to an endless chain revolving upon rollers, on a large arm or crane built upon said dredge, from which buckets elevated the dirt and gravel from the bottom and bank of said pond, dumping it into a large wood and iron hopper aboard said dredge, from which said dirt and gravel were carried by a stream of water through wood and iron sluice boxes extending to the rear of said dredge.

That said Moreno Creek is — torrential stream in a mountain valley, subject to heavy floods from melting snows and rains in the high mountains adjacent to the valleys; that said Pond upon
202 which said dredge is floated is protected from floods which come down said stream and from the nerby hill sides by embankments and ditches, which should be repaired and renewed from time to time when damaged by waters and debris; that said dredge since it stopped work in 1905, has been anchored by cables, fastened to posts set in the ground on the shores of said pond; that said dredge was constructed in the year 190Z and used for about four years; that the materials, machinery, and equipments of said dredge were transported by wagon, over rough mountain roads from the nearest railway station, a distance of fifty-five miles.

6. That on the 12th day of March, 1906, a petition in bankruptcy was filed in the United States District Court, for the Northern district of Illinois, against The Oro Dredging Company, defendants herein, and thereafter such proceedings were had that on the 23rd day of April, 1906, the said defendant was by said Court duly adjudged a bankrupt, and thereafter, on the 9th day of July, 1906, the appellant herein Frank H. Jones, was duly appointed trustee in bankruptcy of said Oro Dredging Company, and duly qualified as such on the 16th day of July, 1906; that the order of May, 1st, 1906, authorizing said receiver, in said attachment proceedings to sell said dredge; the notice published by said Receiver of such sale, and the affidavit of publication thereon; and the sale of said dredge on

the 26th day of June, 1906, were each and all had subsequent to the filing of said petition in bankruptcy and the entry of the order of adjudication thereon; that said J. Van Houton, the plaintiff in said attachment proceedings, is a stockholder of said bankrupt company and was named as a creditor in the sum of $5,888.9 in the schedule filed on June 22nd, 1906, in said bankruptcy proceedings; that said *proceedings; that said* Oro Dredging Company was on said 12th day of March, 1906, the day said petition in bankruptcy was filed in said bankruptcy court, incolvent.

7. That the appearance of Frank K. Jones, trustee as aforesaid, was first entered in this cause on the 2nd day of August, 1906 and there had not been prior to *d*aid 2nd day of August, 1906, any pleadings, or papers, of any description whatsoever filed in
203 said cause, advising this court or the parties to the said attachment proceedings, that the petition for the adjudication of the bankruptcy of the defendant company had been filed as aforesaid, or advising the said court or the Judge thereof or any of said parties, that the said defendant company had been adjudged a bankrupt; that on said last mentioned date, the appearance of Frank K. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, was filed in said cause and a motion made by him to dissolve said attachment, and for an order upon said Receiver so appointed by said Court, directing him to turn over to the said Trustee all the property which came into his possession as such Receiver, which said motion was by said District Court stricken from the files; that on the 4th day of August, 1906, said Trustee filed his intervening petition herein and alleged the proceedings had in said bankruptcy court and sought to have the sales of said dredge to said Springer vacated and set aside, and said attachment dissolved, and thereafter and on Sept. 22nd, 1906, filed herein his amended intervening petition, in and by which the same relief was prayed as in said original intervening petition; and answer was thereafter filed to said amended intervening petition by said Springer, issue joined and the cause tried on the 8th day of November 1907, upon a stipulation of facts entered into between said Trustee and said Springer.

8. That Charles Springer, prior to the time he purchased the dredge and equipment aforesaid, had no actual knowledge nor notice of any kind that proceedings of any nature or character whatsoever had been commenced in the District Court of the United States for the Northern District of Illinois, the purpose of which was to cause the defendant company, to be adjudicated a bankrupt, and had no actual knowledge or information of the filing or pendency of any of the bankruptcy proceedings hereinbefore referred to, until two months after the time of his purchase at the sale aforesaid, and that the said Charles Springer had no actual knowledge or notice at the time of his said purchase at the sale aforesaid, that the said derendant company was insolvent.

9. That Charles Springer, a witness on behalf of the Appellee, testified upon the trial of said cause; that the amount he bid
204 and paid for said dredge to said James K. Hunt, was a fair and adequate price for said property at the date of sale; that

he, the said Charles Springer, prior to and at the time he purchased the same, had knowledge or notice that proceedings of any nature or character whatsoever had been commenced at Chicago Illinois, or any other place, to adjudge the said the Oro Dredging Company a Bankrupt, and was not informed of the fact that such proceedings were had until two months after his said purchase that he had no notice of any kind, or character, prior to or at the time of said purchase, that said the Oro Dredging Company was insolvent, or that proceedings had been commenced, or were pending, which had for their purpose the securing of an order, adjudging said Oro Dredging Company a bankrupt.

All of which said evidence was objected to by appellant on the ground that said Springer was not qualified to testify to the value of said property and that the balance of said evidence was incompetent and immaterial.

Which said notice motion and proposed statement of facts were and are indorsed on the back thereof, as follows, towit:—"No. 1232—In the Supreme Court of the Territory of New Mexico, January Term, 1910.—Frank H. Jones, Trustee in Bankruptcy, of the Oro Dredging Company, a bankrupt, Intervenor, Appellant, vs. Charles Springer, Appellee.—Notice Motion and Proposed Statement of facts.—Filed in my office this Jan. 8th 1910 Jose D. Sena, Clerk.—Elmer E. Studley, Raton N. M. Scott, Bancroft and Stephens, Chicago, Illinois, Attorneys for Appellant.

205 And afterwards, on to wit, *on* the 25th day of January 1910 there was filed on the office of the Clerk of the Supreme Court of the Territory of New Mexico a certified copy of an order made and entered in the Supreme Court of the United States of America, which said order was and is in the *following* words and figures as follows to wit:

Supreme Court of the United States, October Term, 1909.

No. —.

FRANK W. JONES, Trustee in Bankruptcy of the Oro Dredging Co., Bankrupt, Appellant,
vs.
CHARLES SPRINGER.

On consideration of the petition of the above named appellant, for an order extending the time for filing the transcript of record on this appeal.

It is ordered that the time for filing said transcript be, and the same is hereby, extended to and including the first day of April 1910.

(Signed) WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Washington, D. C., January 17th, 1910.

A True Copy:
Test:
[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Which said order was and is endorsed on the back thereof, as follows to wit: File No. 1232. Supreme Court of the United
206 States, October term 190– Term No. — Filed in my office this Jan. 25th, 1910. Jose D. Sena, Clerk.

And afterwards, on to wit, *on* the second day of March, 1910 there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a supplement*al* to proposed statement of facts, which said supplement*al* to proposed statements of facts was and is in the following words and figures to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

FRANK H. JONES, Trustee,
vs.
CHARLES SPRINGER.

Appeal from District Court, Fourth Judicial District.

Now comes the appellant herein and presents the following in place of the last page of its proposed statement of facts heretofore presented herein.

9.

The Evidence Objected to by Appellant and the Rulings of the Court Thereon.

Charles Springer the appellee called as a witness on his own behalf, upon the trial of said cause, testified: "that the amount he bid and paid for said dredge to said James K. Hunt was a fair and adequate price of said property at the date of sale."

to which evidence the appellant then and there objected and excepted for the reason that said witness was not qualified to so testify. Which objection was by the court overruled and the appellant by his counsel duly excepted to such ruling.

Charles Springer appellee called as a witness on his own behalf, upon the trial of said cause, testified: "that he prior to and at the time he purchased the dredge in question herein *he* had no knowledge or notice that proceedings of any nature or character whatsoever had been commenced at Chicago, Illinois, or any other place,
207 to adjudge the said the Oro Dredging Company a bankrupt, and was not informed of the fact, that such proceedings were had until two months after his said purchase: that he had no notice

of any kind, or character, prior to or at the time of said purchase, that said the Oro Dredging Company was insolvent, or that proceedings had been commenced or were pending which had for their purpose the securing of an order, adjudging said Oro Dredging Company, a bankrupt.

To which evidence the appellant then and there objected and excepted for the reason that said evidence was immaterial.

Which objection was by the court overruled and the appellant by his counsel duly excepted to such ruling.

ELMER E. STUDLEY,
SCOTT, BANCROFT & STEPHENS,
Attorneys for Appellant.

To the Supreme Court:

I object to the proposed evidence of Charles Springer being inserted in the findings unless all of his evidence is inserted not a portion, thereof, on page 113, Mr. Springer testifies to the character of the boat, showing his knowledge thereof which is the basis upon which he is permitted to state the value thereof.

CHARLES A. SPIESS.

The Law is that any person may testify to values, without being an expert, if such party shows acquaintance with the thing about which he testifies.

The Submitted finding leaves out all evidence that Charles Springer was familiar with and acquainted with the dredge.

CHARLES SPIESS.

Which said supplemental findings of facts was and is endorsed on the back thereof as follows to wit: No. 1232. Supreme Court of the Territory of New Mexico. Jones Trustee vs. Springer. Filed in my Office this Mar. 2, 1910. Jose D. Sena, Clerk. Supplemental Statement of Facts. Elmer E. Studley, Scott, Bancroft and Stephens Attorneys for appellant."

208 And Afterwards on to wit *on* the 21st day of March A. D. 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a Statement of facts and of the rulings of the admission or rejection of evidence excepted to in the trial court, made by the Supreme Court of New Mexico, on the appeal of said cause to the Supreme Court of the United States, which said Statement of the facts and of the rulings on the admission or rejection of evidence, excepted to in the trial court, *excepted to in the trial court*, made by the Supreme Court of New Mexico on the appeal of said cause to the Supreme Court of the United States &c. was and is in the following words and figures to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, a Bankrupt, Intervenor, Appellant,
vs.
CHARLES SPRINGER, Appellee.

Appeal from District Court, Fourth Judicial District, Colfax County.

Statement of the Facts and of the Rulings on the Admission or Rejection of Evidence Excepted to in the Trial Court, Made by the Supreme Court of New Mexico, on the Appeal of said Cause to the Supreme Court of the United States, under United States Statute, Act of April 7, 1874 (19 Stat. at L., 27).

This matter having come on to be heard upon the application of the appellant herein for a statement of the facts of the case in the nature of a special verdict, and the court being fully advised in the premises, adopts the findings of fact made by the trial court, namely:—

209 1. That the writ of attachment in the above entitled cause was issued by the Clerk of this Court on the 23rd day of February, 1906, and duly executed on the 27th day of February, 1906, by the Sheriff of Colfax County, New Mexico, by levying upon a certain mining dredge, together with tools, machinery, and other property used in connection therewith, and certain real estate, situated in said County, all said property—real estate and personal—then being the property of the Oro Dredging Company, defendant herein.

2. That on the 19th day of March, 1906, upon application of plaintiff, James K. Hunt was duly appointed by this Court as Receiver for the purpose of holding and conserving the said mining dredge and other property appurtenant thereto and used in connection therewith; and said Receiver was directed by the Court to give notice to each of the stockholders of said Oro Dredging Company, of his appointment as such Receiver, which notice he gave so far as he could ascertain the names of such stockholders.

3. That on the 1st day of May, 1906, a petition was duly presented to the Judge of this Court for an order directing the sale of said mining dredge, so attached as aforesaid, it being alleged as ground therefor, that the said dredge was of a perishable nature, and was liable to be diminished in value before the final adjudication of this case, and said Judge of this Court having heard and considered the testimony of witnesses as to said dredge and equipment, and it appearing that the defendant had not given bond to retain the possession of the same, and the Judge of this Court believing that the interests of both plaintiff and defendant would be promoted by the sale of the same, ordered the said Receiver, James K. Hunt, to sell said

dredge and equipment, and directed that said sale should be made at public auction at the City of Raton, at the front door of the Court House, after thirty days' notice of the time and place of such sale, by publication once each week for four successive weeks in the Raton Range, a newspaper published in said City of Raton, and that such sale should be made to the highest bidder for cash thereat.

210 4. That said Receiver caused the publication to be duly made as provided in said order, and upon the completion thereof on the 26th day of June, offered for sale to the highest bidder, for cash, at the place specified in said order, the said dredge and equipment.

5. That at the sale aforesaid, Charles Springer was the highest and best bidder for the property aforesaid, bidding the sum of five thousand dollars in cash therefor, and said Receiver thereupon sold the said dredge and equipment to said Charles Springer, taking in payment therefor the said sum of five thousand dollars, which said sum, less certain costs and expenses, was thereupon by him paid into this Court and is still held by the Clerk of this Court. (Meaning the trial court.)

6. That on the 17th day of July, A. D., 1906, the sale aforesaid, was, on report of said Receiver, duly approved and confirmed.

7. That upon the sale aforesaid, the said Charles Springer, took possession of said dredge and equipment, under the sale aforesaid, and ever since has been and still is in the actual possession thereof.

8. That said dredge, at the time of the application aforesaid and at the time of said order of sale, and at the time of the sale thereof, was of a perishable nature, and liable to be lost and diminished in value before the final adjudication of this case.

9. That five thousand dollars was a fair and adequate price for the dredge and equipment aforesaid, at the time of said sale, in its then condition and situation.

10. That on the 12th day of March, 1906, a petition in bankruptcy was filed in the United States District Court for the Northern District of Illinois, against the Oro Dredging Company, defendant herein, and thereafter such proceedings were had that on the 23rd day of April 1906, the said defendant was by said court duly adjudged a bankrupt, and thereafter, on the 9th day of July, 1906, the petitioner herein, Frank H. Jones, was duly appointed trustee in bankruptcy of said defendant, and duly qualified as such on the 16th day of July, 1906.

211 11. That the appearance of Frank H. Jones, trustee as aforesaid was first entered in this cause on the 2nd day of August A. D., 1906, and there had not been prior to said 2nd day of August, 1906, any pleadings, or papers, of any description whatsoever filed in said cause, advising this court or the parties to the said attachment proceedings, that the petition for the adjudication of the bankruptcy of the defendant company had been filed as aforesaid, or advising the said court or the judge thereof, or any of said parties, that the said defendant company had been adjudicated a bankrupt.

12. That Charles Springer, prior to the time he purchased the

dredge and equipment aforesaid, had no knowledge nor notice of any kind that proceedings of any nature, or character whatsoever had been commenced in the District Court of the United States for the Northern District of Illinois, the purpose of which was to cause the defendant company to be adjudicated a bankrupt, and had not knowledge or information of the filing or pendency of any of the bankruptcy proceedings hereinbefore referred to, until two weeks after the time of his purchase at the sale aforesaid, and that the said Charles Springer had no knowledge or notice at the time of his said purchase at the sale aforesaid that the defendant company was insolvent.

13. That said Charles Springer was a bona fide purchaser of said mining dredge and equipment, for value, and acquired the same without notice or reasonable cause for inquiry as to whether or not there had been commenced proceedings in bankruptcy against said defendant company.

Further, to avoid misunderstanding and to insure the presentation of the cause in the appellate tribunal on the identical questions which were presented for decision here, it is found and stated:

(A) That by the word "knowledge" used in the 12th finding of fact, and the word "notice", in the 13th finding, actual knowledge and notice are meant, as distinguished from knowledge and notice which might be imputable as a matter of law.

(B) Upon the representation of the appellant that the 8th finding of fact was not warranted by the evidence for the reason that on the evidence the dredge was not perishable property within the meaning of the statute of New Mexico, relating to the sale of perishable property before judgment; that said question was necessarily before this court and decided by it in this cause and will not be before the appellate tribunal, unless said finding is supplemented by a statement of the ultimate facts on which it is based,—it is found and stated that said mining dredge is a large boat, constructed of wood, iron and steel, equipped with machinery, tools and appliances for dredging, elevating, washing, and extracting gold from placer dirt and gravel; that said boat is afloat upon an artificial lake or pond along side of the Moreno River or Creek, about half a mile from Elizabethtown in Colfax County, New Mexico, that the water to keep said pond at the proper level to float said dredge was obtained from a ditch leading from said creek, and the said dredge was operated by moving the same around upon said pond, and working a large number of iron and steel buckets, weighing upwards of one thousand pounds each, attached to an endless chain, revolving upon rollers on a large arm or crane built upon said dredge, from which buckets elevated the dirt and gravel from the bottom and bank of said pond, dumping it into a large wood and iron hopper abroad said dredge, from which said dirt and gravel were carried by a stream of water through wood and iron sluice boxes, extending to the rear of said dredge.

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That said Moreno Creek, is a torrential stream in a mountain valley, subject to heavy floods from melting snows and rains in the high mountains adjacent to the valleys; that said pond upon which said

dredge is floated is protected from floods which come down said stream and from the nereby hillsides by embankments and ditches which should be repaired and renewed from time to time when damaged by waters and debris: that said dredge since it stopped work in 1905, has been anchored by cables, fastened to posts set in the ground on the shores of said pond: that said dredge was constructed in the year 1901, and used for about four years; that the
213 materials, machinery and equipments of said dredge were transported by wagon, over rough mountain roads from the nearest railway station, a distance of fifty five miles. (This finding adopts a stipulation of the parties in the trial court.)

(C) That findings of fact numbered 3, 4, 5 and 6 are based on the pleadings in the cause found in the record transmitted herewith and on nothing outside of them.

Rulings of the Trial Court on the Admission of Evidence Excepted to by the Appellant.

Charles Springer, the appellee, called as a witness in his o-n behalf, testified that he purchased said mining dredge from James K. Hunt, receiver, at a public sale thereof, at which there were several bidders other than himself, that the amount he bid and paid therefor to said James K. Hunt, was a fair and adequate price for said property at the date of sale * * * and that since the said purchase and the taking possession of said property by him, he has paid out for the care, insurance, and repairs to said mining dredge, dams, ditches and head-gate, necessary to protect said property from floods and storms the sum of one thousand five hundred and forty-four dollars and ninety cents—and that said dredge had not been operated since the autumn of 1905 and that the same could not be safely operated without a considerable outlay *of* repairs.

To which evidence the appellants then and there objected and excepted for the reason that said witness was not qualified to so testify.

Which objection was by the court overruled and the appellant by his counsel duly excepted to such ruling.

Charles Springer, the appellee, called as a witness in his own behalf, testified that prior to and at the time he purchased the dredge in question herein, he had no knowledge or notice that proceedings of any nature or character whatsoever had been commenced at Chicago, Illinois, or any other place, to adjudge the said The Oro Dredging Company a bankrupt, and was not informed of the
214 fact that such proceedings were had until two months after said purchase: that he had no notice of any kind, or character, prior to or at the time of said Purchase, that said The Oro Dredging Company was insolvent, or that proceedings had been commenced or were pending which had for their purpose the securing of an order, adjudging said Oro Dredging Comany a bankrupt.

To which evidence the appellant then and there objected and excepted, for the reasons that said evidence was immaterial.

Which said objection was by the Court overruled, and the appellant by his counsel duly excepted to such ruling.

BY THE COURT.

which said findings of facts etc. by the court, were endorsed on the back thereof, as follows to wit. "No. 1232—In the Supreme Court of the Territory of New Mexico, January term 1910—Frank H. Jones, Trustee in Bankruptcy of the Oro Dredging Company, a bankrupt, Intervenor, Appellant, v. Charles Springer, Appellee—Statement of the facts and of the rulings on the admission or rejection of evidence excepted to in the trial Court, made by the Supreme Court of New Mexico, on the appeal of said cause to the Supreme Court of the United States, &c. Filed in my office, this Mar. 21st. 1910 Jose D. Sena, Clerk."

And heretofore, on towit, *on* the first day of July, A. D. 1909, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1232.

FRANK H. JONES, Trustee in Bankruptcy of the Oro Dredging Company, Bankrupt, Intervenor, Appellant,
vs.
CHARLES SPRINGER, Appell*ant*.

Appeal from District Court of Colfax County.

Appearances:

Elmer E. Studley, Raton, N. M.; Scott, Brancroft & Stephens, Chicago, Ill., Attorneys for Appellant.

Charles A. Spiess, East Las Vegas, N. M., Attorney for appellee.

215 *Syllabus.*

1. A purchaser of property sold under Section 2716, C. L. who was a bona fide purchaser for value, without notice has a perfect title to such property.

2. Where a state or Territorial Court sells attached property, as perishable or liable to be lost or diminished in value during the pendency of bankrupt proceedings against the attachment creditor, of which neither the Court, the Officer making the sale, or the purchaser had any notice until after the sale was confirmed, the trustee in bankruptcy must take the proceeds of such sale in lieu of the property so sold.

3. A bona fide purchaser for value at such sale is specifically protected by the proviso following Section 67*f* of the Bankruptcy Act of 1898 (30 Stat. L. 565).

Statement of Facts.

On February 26th, 1906, one J. Van Houten brought an action by attachment against The Oro Dredging Company a corporation organized under the laws of the State of Illinois, but doing business in Colfax County N. M. Said Van Houten caused a writ of attachment to issue out of said court, and the same was levied on the property of said Dredging Company, located in Colfax County, consisting of certain real estate and some personal property, among the latter being the dredge in controversy. There is no contention, but the attachment was regular in all things, though there was no personal service on the Oro Dredging Company, but by publication, and an appearance entered for it by the Clerk, upon the order of said Court; jurisdiction of the property attached was thus acquired.

The writ of attachment was served on February 27, 1906, as shown by the Sheriff's return, and on March 21st, of the same year an application for a special receiver was made to take charge of the dredge, and upon a showing by affidavits that such receiver was necessary, the Court on said day, appointed one James K.
216 Hunt, as such receiver, who qualified and appears to have taken possession of the dredge at or about that time. Afterwards, on May 1st, 1906, a motion was made by Van Houten's attorney, to have the dredge sold by the Receiver, and on that day an order for its sale was made by the Court, said order reciting that "The Court having considered testimony, heretofore produced, before him on the application for the appointment of a Receiver, and the further testimony of William C. Wrigley, Esq., Attorney for plaintiff, in the suit of H. J. Reilling vs. Oro Dredging Company, brought in this Court, and finding that it is expensive to protect and conserve said dredge, and that the same is deteriorating in value, and that the best interests of the defendant, Oro Dredging Company, as well as of creditors, and all parties concerned in the same are best protected by a speedy sale of said dredge, etc."

At the sale, on June 26th, 1906, which appears to have been conducted in accordance with the Order of the Court, one Charles Springer, was the purchaser for $5,000.00 cash, and the sale was confirmed, and the possession of the dredge taken by Springer. Appellant's counsel seem disposed to dispute the confirmation of the sale in their brief, but as it is pleaded by appellant in par. 12, of his amended petition in intervention, counsel's argument must be the result of an oversight.

After the attachment proceedings were brought by Van Houten, in Colfax County, N. M., as aforesaid, certain creditors of The Oro Dredging Company filed a petition in Bankruptcy against said Company in the United States District Court for the Eastern Division of the Northern District of Illinois, and on April 23rd, 1906, said The Oro Dredging Company was duly adjudged a bankrupt in said

Court. On July the 9th, of said year the intervenor, Frank H. Jones, of Chicago Illinois, was duly appointed Trustee in Bankruptcy for said Bankrupt, and became duly qualified by giving the required bond, which was approved on July 16th, 1906.

217 The first intimation that the District Court of Colfax County, New Mexico, or any of the litigants or parties interested in the attachment proceedings, including Springer, the purchaser at the sale, seem to have had of the bankruptcy proceedings, was on August 2nd, 1906, when an appearance was entered in said District Court of Colfax County, for the purpose of moving that Court to dissolve the attachment, and order all the attached property including the dredge, turned over to the Trustee in Bankruptcy.

This motion was filed, and on motion of Van Houten's counsel, was, by the Court, striken from the files.

The Trustee in Bankruptcy, thereafter, on August 4th, 1906, filed in the District Court of Colfax County, aforesaid, an order of the Bankruptcy Court authorizing him, said trustee, to intervene in the attachment suit, which he accordingly did, setting up the bankruptcy proceedings, etc. and praying for the dissolution of the attachment, and the possession of all the attached property, including the dredge, which had been sold and delivered to Springer. Springer answered setting up the attachment proceedings, and the sale of the dredge to him. The issue thus joined was submitted to Honorable Wm. J. Mills, Chief Justice of the Supreme Court, and Judge of the Fourth Judicial District on the pleadings evidence, and stipulation of counsel, as to certain facts, who, after due hearing dissolved the attachment as to all the property involved, except the dredge, which he awarded to Springer, and from the judgment in Springer's favor, appellant duly appealed to this Court.

Opinion of the Court.

MANN, A. J.:

The question of law involved is, whether or not Charles Springer is a bona fide purchaser for value, within the meaning of the proviso in Paragraph *f* of Sec. 67, of the Bankruptcy Act, 30 Stat. 1, 565, 1 Fed. St. Am. 693.

The answer to this question depends upon whether or not the trial Court in the attachment case had authority to order the sale, and if such *and if such* authority existed, whether or not

218 Springer was a purchaser for value in good faith, and without notice or reasonable cause for inquiry, as to the Bankruptcy proceedings.

The Statute under which the dredge was sold is Section 2716, C. L., and reads as follows:

"In all suits in the district Courts by attachments, when the property attached shall be of a perishable nature, and liable to be lost or diminished in value before the final adjudication of the case and the defendant shall not give bond to retain the possession of the same, the plaintiff or defendant may make out a petition in writing setting forth the kind, nature and condition of the property, and

present said petition to the judge of the district in vacation; and if he shall find it sufficient in form and conditions, he may hear the testimony of witnesses as to the property, and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property, may order such sale to be made, and direct the manner thereof."

We think this statute is clearly intended to provide for two contingencies (*a*) When goods are perishable in their nature. (*b*) When they are liable to be lost or diminish in value before the final adjudication of the case. This must be true, else second clause of the statute must be taken as wholly meaningless, for property that is "perishable in its nature" would certainly be liable to be lost or diminished in value.

It is a well settled rule of statutory construction that "a statute must receive such reasonable construction as will, if possible, make all its parts harmonize with each other, and render it consistent with its scope and object. 2 Lewis Sutherland Stat. Cons. (2nd Ed.) Secs. 368-370.

The order of sale recites that the dredge in question was deteriorating in value, which brings it within one of the classes specified in the statute, so that the trial Court had jurisdiction to order its sale. McGreery vs. Barney Natl. Bank, 116 Ala. 224, 67 Am. St. Rep. 105; Bueler vs. Woods, et al., 43 Mo. App. 494. Young vs. Kellar, 94 Mo. 581.

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Much has been said by counsel in their briefs and many cases cited, as to what kinds of property may be sold under statutes similar to ours, as perishable, and many cases are to be found which hold that it must be property that has an inherent tendency to decay or become a total loss, such as fruits, fresh meats, fish and like articles, which from their nature will become a total loss unless sold at once, but the modern doctrine and we think by far the more practical and common sense view is that stated in McGreery v. Berney Nat'l Bank supra.

"This theory would limit the power of the Court to order the sale of only such property as contained in itself the elements of speedy decay, such as fruits, fish, fresh meats, et cetera, or such as from its nature could be said to be perishable without any evidence to prove the fact, and cannot be sustained without giving to our statutes regulating the subject, a construction so narrow as to defeat the manifest purpose intended to be accomplished by the legislature in their enactment, and to defeat also in many instances the purpose of the statutes authorizing the remedy by attachment."

The very fact that our statute gives the Judge authority to hear the testimony of witnesses as to the property, and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property, may order such sale to be made and direct the manner thereof, would indicate an intention on the part of the legislature to leave the question of what property or class of property might be thus ordered sold, in the discretion of the Judge, in each particular case.

It is contended that the judge of the District Court had no power

to order the sale because no formal petition therefor appears in the record.

The third finding of fact of the learned Trial Court on
220 Page 144 of the record, is to the effect that on the first day of May, 1906 a p-tition was duly presented to the Judge of this court for an order directing the sale of said mining dredge, etc." and in the stipulation of counsel at p. 120 of the record, Mr. McLeish appellant's counsel, states. "The application to sell the dredge was made, as I understand it, under a statute of this Territory, which provides for the sale of perishable property."

It therefore seems that no such claim was made at the trial, and no such issue raised in the trial court, and this Court will therefor indulge the presumption that the petition was duly filed in the absence of affirmative proof to the contrary.

If the sale was regularly made upon an order of a Court of competent jurisdiction, and if Springer was a purchaser of the dredge in good faith, and without notice, can his title be questioned?

The case of Young v. Kellar 94 Mo. 581, is a very instructive case upon this point, and after collating and analyzing the authorities lays down the rule that "where attached property is sold under an order of the Court, because of its perishable nature, the purchaser takes a title good, as against the world."

The reason for this rule is obvious, such sales are made upon the theory that it is for the interest of all parties concerned. The title to the property is in dispute and the property itself in custodia legis to abide the result of the suit. It is made to appear to the Court that unless the sale is made, the result of the suit will avail neither party, as its value will be diminished or destroyed before the right to the thing can be determined, in due course of law. It is therefore ordered changed from its perishable form into money, which is imperishable so that he who prevails in the suit may not be deprived of the benefits of his victory.

The purchaser at such a sale stands upon different ground than the ordinary purchaser at a Judicial sale, upon execution after judgment. He not only succeeds to the title of the judgment creditor but to the rights of all parties, to the suit, which may be
221 afterwards determined, and the rights of all the parties to the suit attach to the proceeds of the sale in lieu of the thing sold.

The proceeds of this sale then passed to the Trustee in Bankruptcy in lieu of the dredge itself, Springer, the purchaser at the sale, being a bona fide purchaser for value, without notice or reasonable cause for inquiry within the meaning of the proviso to Section 67*f*. of the Bankruptcy Act of 1898. (30 Stat. L. 565) Clark v. Larremore, 188 U. S., 486; In Re Kenney, 105, Fed. Rep. 897; In Re Kenney 95 Fed. Rep. 427; In Re Franks, 95 Fed. Rep. 635.

In the case of York Manufacturing Company vs. Cassell, 201, U. S. 344; the Supreme Court of the United States speaking of the rights of the Trustee in Bankruptcy under the present bankruptcy law, through Mr. Justice Peckham, says:

"Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's prop-

erty than belonged to the bankrupt at the time when the trustee's title accrued. * * * The remark in Mueller vs. Nugent, 184 U. S., that the filing of the petition (in Bankruptcy) is a caveat to all the world, and in effect an attachment, and injunction, was made in regard to the particular facts in that case."

In this case neither the Court below, the receiver making the sale, or the purchaser had any notice of the bankruptcy proceedings, in the United States Court for the Northern District of Illinois. The sale was regularly made, under the order of the Court, and without any knowledge whatever of the bankruptcy proceedings. The Court passed upon the necessity of selling the dredge and it was sold, and the proceedings are apparently still, in the hands of the Court. Under these circumstances the learned trial Court was right in refusing to set aside the sale of the dredge and ordering it turned over to the trustee, and the judgment if affirmed.

EDWARD A. MANN,
Associate Justice.

222 We Concur:

FRANK W. PARKER, *A. J.*
JOHN R. McFIE, *A. J.*
IRA A. ABBOTT, *A. J.*
WM. H. POPE, *A. J.*

Mills, C. J., having heard the cause in the lower Court did not participate.

TERRITORY OF NEW MEXICO,
Supreme Court, ss:

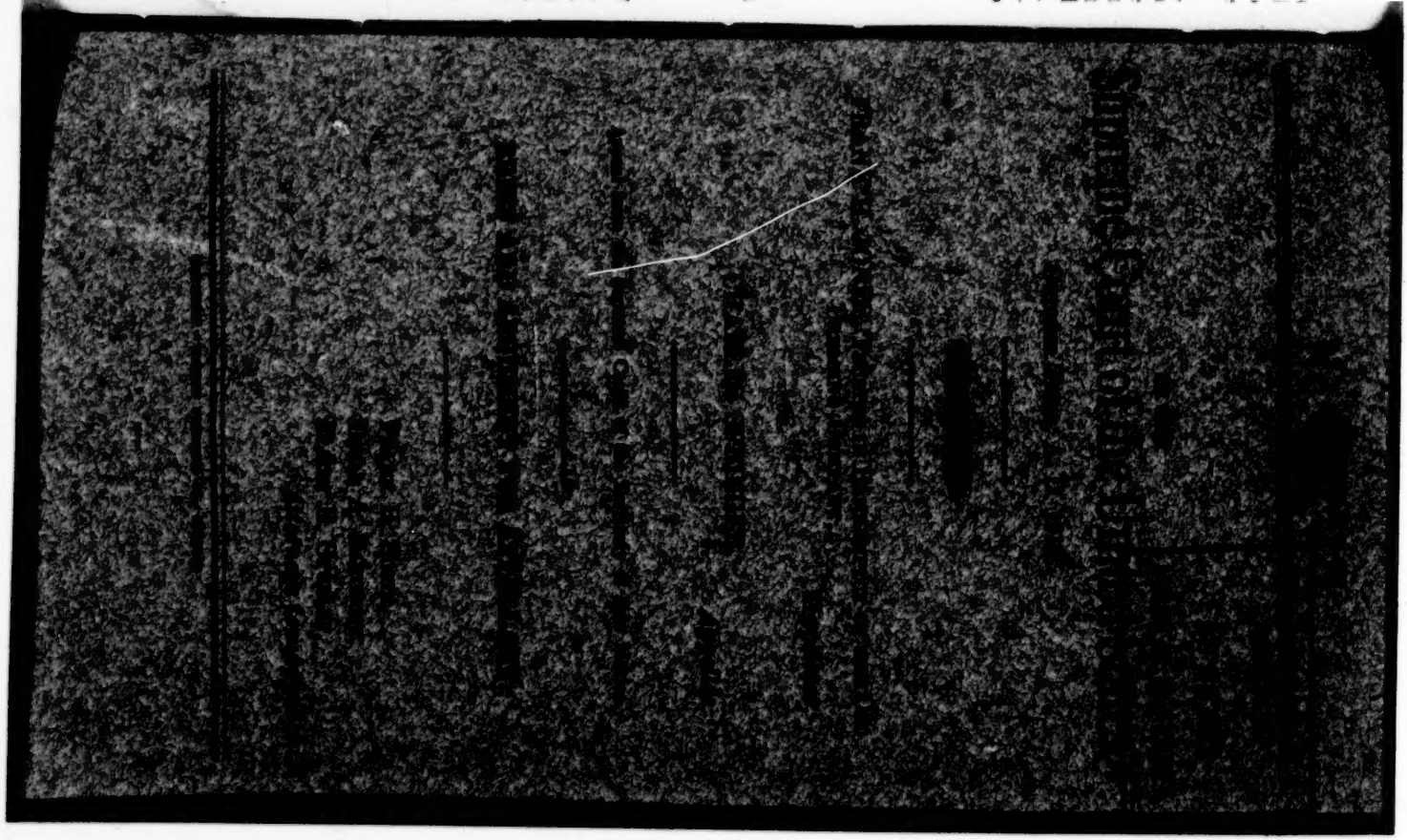
I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico do hereby certify that the above and foregoing two hundred and twenty one pages and seven lines, contain a true, full, perfect and complete copy of the record and proceedings, pleadings and opinion filed in the above entitled cause, which is transmitted to the Supreme Court of the United States, in accordance with an appeal herein, heretofore allowed.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico this the 22nd day of March A. D., 1910.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 22,080. New Mexico Territory Supreme Court. Term No. 485. Frank H. Jones, trustee in bankruptcy of The Oro Dredging Company, appellant, vs. Charles Springer. Filed March 29th, 1910. File No. 22,080.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1910.

No. 485

FRANK H. JONES, TRUSTEE IN BANKRUPTCY OF THE ORO DREDGING COMPANY,

Appellant,

vs.

CHARLES SPRINGER,

Appellee.

Appeal from the Supreme Court of the Territory of New Mexico.

STATEMENT OF THE CASE.

The Oro Dredging Company, in 1906, was engaged in placer mining along Moreno Creek in Colfax County, in the then Territory of New Mexico, and had its principal office in Chicago, Illinois. The properties of the company consisted principally of lands upon which it was operating and a large mining dredge, constructed of wood, iron and steel, together with machinery, tools and appliances for dredging, elevating and extracting gold from placer dirt and gravel.

The dredge cost seventy-five thousand dollars (Rec., 14), and was the only means used by the company to mine the lands above mentioned. It follows, that to remove the dredge from the premises would be to greatly depreciate the value of the mining properties.

An involuntary petition in bankruptcy was filed against the Oro Dredging Company on March 12, 1906, in the District Court for the Northern District of Illinois, Eastern Division, sitting in Chicago. It was alleged in the petition so filed, that the alleged bankrupt was insolvent and that while insolvent it had committed divers acts of bankruptcy. (Rec., 81, 82.)

On April 23, 1906, the petitioners in the bankruptcy court having proved the allegations of their petition, the Oro Dredging Company was duly adjudged a bankrupt. (Rec., 84.) The usual machinery of the bankruptcy court was put in motion, and on July 9, 1906, Frank H. Jones, appellant herein, was appointed trustee of said bankrupt company and he duly qualified as such on July 16, 1906. (Rec., 85-86.)

On February 23, 1906, only seventeen days before the petition in bankruptcy was filed, J. Van Houten, a creditor of the Oro Dredging Company, and mentioned as such in the schedules filed in the bankruptcy court (Rec., 88), commenced an attachment suit in the Territorial District Court of New Mexico. (Rec., 4.) On February 29, 1906, the sheriff levied the writ of attachment upon the properties of the Oro Dredging Company in Colfax County, in-

cluding the lands and dredge above mentioned. (Rec., 11, 12.)

Following the levy of the attachment writ and on March 21, of the same year, an application was made by the plaintiff in the attachment suit for the appointment of a receiver *for the purpose of making necessary repairs on the hull and machinery of said dredge, and to take whatever means were necessary to protect the same from damage from high water in Moreno Creek, and to take such other measures as were necessary to conserve the same.* (Rec., 13.) In support of such motion affidavits were filed in which it was stated that work should be done to minimize the danger of high water. (Rec., 14, 15.)

A receiver was appointed in the attachment proceedings on March 19, 1906, *with the limited power, to repair and protect the dredge from high water at an expense of not to exceed one thousand dollars.* (Rec., 16.)

The New Mexico statutes provided for the sale of property of a perishable nature, taken by attachment and liable to be lost or diminished in value before final judgment.

On May 1, 1906, *seven days after the adjudication in bankruptcy was entered*, an application was made to the Territorial District Court for leave to sell the dredge, then in the hands of the receiver. The court entered a finding upon such application *that it was expensive to protect and conserve the dredge; that the same was deteriorating in value and that it was for the best interests of all parties that a*

speedy sale of the dredge be had. (Rec., 24.) The dredge was thereupon ordered sold, but no sale was had until June 26, 1906, a few days before the trustee in bankruptcy was appointed, when it was sold for five thousand dollars to Charles Springer, appellee herein.

No service was had upon the Oro Dredging Company in the attachment proceedings, except by publication. At the time the order of sale was entered the service was complete and plaintiff could have proceeded to an immediate trial and final judgment. Nevertheless the dredge was ordered sold as property, that might have been lost before final judgment, on the grounds that it was expensive to keep and was deteriorating in value. There is nothing in the record to show, that the bankruptcy matter was called to the attention of the Territorial District Court before the sale of the dredge, *although the plaintiff was a creditor and a stockholder* of the bankrupt company. Notice of a meeting to elect the trustee in bankruptcy was duly and regularly given to all the creditors of said bankruptcy estate. (Rec., 85.)

The unusual proceeding of notifying the stockholders of the bankrupt company of the appointment of the receiver by the Territorial Court was had (Rec., 24), but the notice so given was to the effect *that the receiver was appointed to conserve the property.* Nothing was said in such notice, or in any notice thereafter given to the stockholders that said receiver had been authorized to sell the dredge. (Rec., 21.)

On August 2, 1906, about six days after the qualification of Frank H. Jones as trustee in bankruptcy, he appeared in the attachment suit, and moved the court to vacate the sale of the dredge so made to appellee. (Rec., 26-29.) The plaintiff in the attachment suit moved the court to strike the motion of the trustee in bankruptcy from the files, which motion was sustained. (Rec., 30, 31.) The trustee in bankruptcy then filed in the attachment proceedings an intervening petition in which it was alleged that the intervenor was the duly appointed and qualified trustee in bankruptcy of the Oro Dredging Company, and that the proceedings were had in the bankruptcy court as hereinbefore stated. It was also alleged therein:

That the sale of the dredge in said attachment proceeding was void and of no effect, and that the price paid for the dredge by the purchaser at said sale was grossly inadequate and that said purchaser was not a *bona fide* purchaser for value without notice or reasonable cause for inquiry; that the dredge so sold was a ponderous piece of machinery of wood and iron, and was not perishable property within the meaning of the statute of the Territory of New Mexico relating to the sale of perishable property before final judgment, and that the order of sale made under said attachment proceedings was improvidently entered and conferred no lawful authority on the receiver appointed therein to sell said property, and that no title passed by such sale to appellee. (Rec., 42-48.)

The intervening petition prayed that the order of

sale be set aside and vacated; that the attachment be dissolved and the possession of the dredge and other property attached be turned over to the trustee in bankruptcy.

An answer was filed by Charles Springer, the purchaser of the dredge, to the intervening petition of the trustee in bankruptcy. The purchaser denied the allegations of the intervening petition; denied that he had any notice of the bankruptcy proceedings, or reasonable cause for inquiry; also denied the inadequacy of the purchase price of said dredge, and affirmatively charged that the proceedings had in the Territorial Court were regular and sufficient, and that the title to the dredge passed to him at said sale. (Rec., 60-64.)

The cause was submitted to the trial court on the stipulation of the parties and the record made in the attachment suit, which stipulation admitted all the proceedings had in the bankruptcy court, contained a description of the dredge and its location, and admitted that the Oro Dredging Company was insolvent at the time the adjudication in bankruptcy was entered. (Rec., 66-73.) Charles Springer testified, under the objection of appellant, that he had no knowledge of the bankruptcy proceedings at the time of his purchase at said sale, and that he paid a fair price for the dredge under the then circumstances. (Rec., 72.)

The trial court, upon a final hearing, directed that the lien of attachment be vacated and dissolved and that the sheriff of Colfax County deliver over the possession of the real estate to the

trustee in bankruptcy. The prayer of the petition of the trustee, in so far as it sought an order awarding the possession of the mining dredge to the trustee in bankruptcy was denied and it was held that Charles Springer, the purchaser of the dredge, was entitled to the same. (Rec., 93.)

An appeal was prayed to the Supreme Court of the Territory of New Mexico and that court affirmed the judgment of the trial court. The present appeal was prayed from the judgment of the Territorial Supreme Court.

The Supreme Court of the Territory of New Mexico made special findings of fact, in substance as follows:

That the proceedings were had both in the Territorial District Court and the Bankruptcy Court, as hereinbefore stated (Rec., 131, 132); that the judge of the trial court, having heard and considered testimony of witnesses, as to the dredge and equipment, and believing that the interests of both plaintiff and defendant would be promoted by a sale of the dredge, ordered the receiver, appointed in the Territorial District Court, to sell the same at public auction; that such a sale was had after publication, and that Charles Springer was the highest and best bidder at such sale; bidding the sum of five thousand dollars, which sum was deposited by the receiver with the clerk of the Territorial Court and is still held in the possession of such clerk.

That the sale of the dredge was confirmed on July 17, 1906, and that the dredge was of a perish-

able nature and liable to be lost and diminished in value before the final adjudication in said cause; that the sum of five thousand dollars was a fair and adequate price for the dredge at the time of said sale in its then condition and situation; that the appearance of the trustee in bankruptcy was first entered in the attachment proceedings on August 2, 1906; that Charles Springer had no knowledge or notice that proceedings in bankruptcy had been commenced in the District Court of the United States for the Northern District of Illinois *until two weeks after the time of his purchase* and that he had no knowledge that the defendant company was insolvent; that Charles Springer was a *bona fide* purchaser of said dredge and equipment for value and acquired the same without notice or reasonable cause for inquiry. (Rec., 131-133.)

The special findings of fact are explained by the court, as is stated therein, to avoid misunderstanding and to insure the presentation of the cause in this court upon the questions presented for decision in the Territorial Supreme Court, as follows:

That the words "knowledge and notice" mean actual knowledge and notice, as distinguished from knowledge and notice which may be imputable as a matter of law.

That the dredge held to be perishable property was a large boat constructed of wood, iron and steel, equipped with machinery, tools and appliances for dredging, elevating, washing and extracting gold from placer dirt and gravel; that the same was afloat upon an artificial lake or pond along

side of Moreno Creek, a torrential stream in a mountain valley, subject to floods from melting snows and rains in the high mountains adjacent to the valleys; *that said pond upon which said dredge is floated is protected from floods, which come down said stream from the near-by hillsides, by embankments and ditches which should be renewed from time to time when damaged by waters and debris;* that the dredge, since it stopped work in 1905, had been anchored by cables fixed to posts set in the ground on the shores of the pond; that the dredge was constructed in the year 1901 and used for about four years, and that the materials, machinery and equipment of the same had been transported by wagon over rough mountain roads from the nearest railway station at a distance of fifty-five miles.

That the findings of fact number 3, 4, 5 and 6 (Rec., 131, 132) to the effect that the sale of the dredge was regularly had upon petition and evidence heard by the trial court, and upon notice duly given, and that the sale of the dredge was approved and confirmed on July 17, 1906, were based on the pleadings in the case, as shown in the record and upon nothing outside of said pleadings.

It is contended by appellant that after the adjudication in bankruptcy, no proceeding could be maintained in the Territorial District Court to sell the dredge which was the property of the bankruptcy estate and in the custody of the United States District Court for the Northern District of Illinois. The attachment was dissolved upon the entry of the

order of adjudication, and the title of the trustee was not dependent upon whether or not the purchaser had notice of the bankruptcy proceedings. The evidence of the purchaser, that he did not know of the bankruptcy proceedings and that he paid a fair price for said dredge was incompetent and immaterial. Notice of the proceedings in bankruptcy was imputed to him by law, and he was not qualified to express an opinion as to the fairness of the price paid for the dredge.

It is also contended that the dredge was not perishable property within the meaning of the general order in bankruptcy providing for the sale of perishable property, nor was it within the meaning of the statute of the Territory of New Mexico providing for the sale of property of a perishable nature and liable to be lost before final adjudication. The sale of the dredge was irregular, in that no proceedings were had for the sale thereof as provided by statute authorizing such sales, and there was no confirmation of the sale of said dredge to the purchaser thereof.

ERRORS RELIED UPON.

I.

The Supreme Court of the Territory of New Mexico erred in holding that the sale of the mining dredge and its equipment, had subsequent to the entry of the order of adjudication in bankruptcy, passed title to said dredge and its equipment to the purchaser thereof as against the title thereto of the trustee in bankruptcy, and in holding that the said Charles Springer was a *bona fide* purchaser of said dredge and its equipment for value, without notice or reasonable cause for inquiry, within the meaning of Section 67-f of the National Bankruptcy Act of 1898 and the amendments thereto.

II.

The Supreme Court of the Territory of New Mexico erred in holding that Charles Springer was a *bona fide* purchaser of said dredge and its equipment for value, and that he acquired the same without notice or reasonable cause for inquiry, and that the sale of said dredge and its equipment to said Charles Springer was, on the 17th day of July, 1906, duly approved and confirmed.

III.

The Supreme Court of the Territory of New Mexico erred in sustaining the trial court in the admission of incompetent and immaterial evidence, in that Charles Springer was allowed to testify, upon the trial of said cause, that prior to the time he purchased said dredge and its equipment, he had no knowledge or notice that bankruptcy proceedings had been commenced in the Bankruptcy Court to adjudge the Oro Dredging Company a bankrupt, and that he was not informed of such bankruptcy proceedings until after his said purchase; that he had no notice, at the time of his said purchase, that said Oro Dredging Company was insolvent, and that the amount he bid and paid for said dredge and its equipment, was a fair and adequate price for the same, in its then condition and situation.

IV.

The Supreme Court of the Territory of New Mexico erred in holding, that said dredge and its equipment, was perishable property, and that the same was property of a perishable nature, and liable to be lost and diminished in value before final adjudication within the meaning and intent of the statute of the Territory of New Mexico, providing for the sale of property of a perishable nature, and liable to be lost and diminished in value before final adjudication in attachment proceedings.

V.

The Supreme Court of the Territory of New Mexico, erred in holding, that the sale of the dredge and its equipment was regularly had upon petition duly presented under said statute providing for the sale of property liable to be lost before final adjudication, and in approving and confirming the findings of the trial judge in said order of sale, and in holding that the said bid by the purchaser at said sale, was a fair and adequate price for the dredge, in its then condition and situation.

BRIEF.

I.

AFTER THE PETITION IN BANKRUPTCY WAS FILED THE ASSETS OF THE BANKRUPT WERE IN CUSTODIA LEGIS, AND THE JURISDICTION OF THE BANKRUPTCY COURT TO SELL THE SAME WAS EXCLUSIVE. THE SALE TO CHARLES SPRINGER WAS HAD SUBSEQUENT TO THE ORDER OF ADJUDICATION IN BANKRUPTCY, AND HE WAS CHARGED WITH NOTICE OF THE PENDENCY OF THE BANKRUPTCY PROCEEDINGS AND COULD OBTAIN NO TITLE SUPERIOR TO THAT OF THE TRUSTEE.

(a) No title passed to the purchaser of the dredge, because the proceedings to sell and the sale, were had subsequent to the entry of the order of adjudication in the bankruptcy proceedings. (Rec., 131, 132.)

Bankruptcy Act of 1898, Sec. 67f, Sec. 70.

Conner v. *Long*, 104 U. S., 228, 231, 232.

Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U. S., 300, 307.

Bank v. *Sherman*, 101 U. S., 403, 406.

Mueller v. *Nugent*, 184 U. S., 1, 14.

Lamp Chimney Co. v. *Ansonia Brass Co.*, 91 U. S., 656, 661.

Mueller v. *Nugent*, 184 U. S., 1, 14.

In re Granite City Band of Del Rapids, 137 Fed. (C. C. A., 8th Cir.), 818, 820, 821.

State Bank of Chicago v. *Cox*, 134 Fed. (C. C. A., 7th Cir.), 91, 93.

(b) The proviso to Section 67f of the Bankruptcy Act of 1898, protecting the title of an innocent purchaser for value, is no protection to appellee, as the same does not apply to the sale made in this case, nor does it under any circumstances contemplate a purchase subsequent to an adjudication in bankruptcy.

Bankruptcy Act of 1898, Sec. 67f, Sec. 70.
Bank v. *Sherman*, 101 U. S., 403, 406.
Mueller v. *Nugent*, 184 U. S., 1, 14.
Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U. S., 300, 306, 307.
Clarke v. *Laremore*, 188 U. S., 486.

(c) The sale in this case was not had in a proceeding to enforce a pre-existing lien, and the adjudication of the territorial court ended, although not appearing upon its own record, when the adjudication was entered in the bankruptcy proceedings.

Conner v. *Long*, 104 U. S., 228, 239, 240.
In re Watts & Sacks, 190 U. S., 1, 27, 28, 30.
Eyster v. *Gaff*, 91 U. S., 521.
Doe v. *Childers*, 21 Wall. (U. S.), 642.

(d) Subsequent to adjudication, perishable property, like all other property of the bankrupt, must be sold in the bankruptcy court.

Conner v. *Long*, 104 U. S., 228.
General Order in Bankruptcy XVIII.
Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U. S., 300, 306.
In re Watts & Sacks, 190 U. S., 1, 27, 30.

II.

ASSUMING THE JURISDICTION OF THE TERRITORIAL COURT TO SELL PERISHABLE PROPERTY WAS CONCURRENT WITH THAT OF THE BANKRUPTCY COURT.

(a) The dredge was not perishable property within the meaning of those words as contemplated by the sale of perishable property in bankruptcy proceedings, in that the dredge was in the custody of the bankruptcy court and could have been conserved, and the same was not destroyed, or expensive to keep, in the sense that it ought to have been sold. (Rec., 14, 16, 24, 25, 72, 73, 133 and 134.)

Bryan v. *Bernheimer*, 181 U. S., 188.

General Order in Bankruptcy XVIII.

(b) The dredge was not perishable property within the meaning of the statute of the territory of New Mexico relating to sales of property of a perishable nature and liable to be lost before final adjudication. (Rec., 14, 15, 16, 25, 72, 132, 133 and 134.)

Mosher v. *Bay Circuit Judge*, 108 Mich., 579; 66 N. W., 478.

Oneida National Bank v. *Paldey*, 2 Mich. N. P., 221.

Newman v. *Cain*, 9 Nev., 234.

Goodman v. *Moss*, 64 Miss., 303; 1 S. Rep., 241.

In re Weis et al. v. *Basket*, 71 Miss., 771, 15 S. Rep., 659.

Compiled Laws of the Territory of New Mexico of 1897, Sec. 2716, which provides:

"In all suits in the District Courts by attachments, *when the property attached shall be of a perishable nature*, and liable to be lost or diminished in value before the final adjudication of the case, and the defendant shall not give bond to retain possession of the same, *the plaintiff or defendant may make out a petition in writing setting forth the kind, nature and condition of the property, and present said petition to the judge of the district in vacation; and if he shall find it sufficient in form and conditions*, he may hear the testimony of witnesses as to the property, and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property, may order such sale to be made and direct the manner thereof."

(c) The proceedings to sell the dredge were irregular and unwarranted, and not such as were contemplated by the statute, in that final adjudication in the attachment proceedings, upon the record in that cause, could have been had on the same day that the application was made and granted to sell the dredge, and no petition was filed setting out the kind, nature and condition of the property, as required by statute. (Rec., 13, 20, 24.)

Compiled Laws of New Mexico of 1897, Sec. 2716 (hereinabove printed at length).

Compiled Laws of New Mexico of 1897, Sec. 2685, Art. VIII, Sub-Sec. 103, provides:

"Any judgment, or decree, except in cases where trial by jury is necessary, may be rendered by the judge of the District Court at any place where he may be in his district, or when in attendance upon the Supreme Court, and the District Courts, except for jury trials, are clared to be at all times in session for all purposes, including naturalization of aliens. * * *

> In the absence from the territory of the judge of the district in which the suit is pending, any other judge may render such judgment, order or decree."

Compiled Laws of New Mexico of 1897, Sec. 2685, Art. VIII, Sub-Sec. 105, provides:

> "Judgment may be had if the defendant fail to answer the complaint as notified by the summons, as follows: * * *
>
> Third: In actions where the service of the summons is by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication and that no answer has been filed, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and, if the defendant be not a resident of the territory, may require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff or to anyone for his use on account of such demand, and may render judgment for the amount which he is entitled to recover."

III.

THE SALE OF THE DEBTOR WAS NOT CONFIRMED BEFORE THE PURCHASER HAD ACTUAL KNOWLEDGE OF THE BANKRUPTCY PROCEEDINGS.

No order confirming said sale to appellee was entered prior to the appearance of the trustee in bankruptcy in said cause, and although the court found that the sale was confirmed on July 17, such finding is not supported by the record. The court also found that the purchaser knew of the bankruptcy proceedings two weeks after his purchase on June 26. (Rec., 25, 28, 55, 64, 65, 132, 133.)

ARGUMENT.

I.

AFTER THE PETITION IN BANKRUPTCY WAS FILED THE ASSETS OF THE BANKRUPT WERE IN CUSTODIA LEGIS, AND THE JURISDICTION OF THE BANKRUPTCY COURT TO SELL THE SAME WAS EXCLUSIVE. THE SALE TO CHARLES SPRINGER WAS HAD SUBSEQUENT TO THE ENTRY OF THE ORDER OF ADJUDICATION IN BANKRUPTCY, AND HE WAS CHARGED WITH NOTICE OF THE PENDENCY OF THE BANKRUPTCY PROCEEDINGS AND COULD OBTAIN NO TITLE SUPERIOR TO THAT OF THE TRUSTEE.

Section 67f of the Bankruptcy Act of 1898 provides:

> "That all * * * attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the * * * attachment or other lien shall be deemed wholly discharged and released from the same. * * *
>
> And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect and, provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such * * * attachment or other lien by a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The lien of the attachment in this case was created through legal proceedings; it was created within

four months before the petition in bankruptcy was filed, and the Oro Dredging Company was insolvent. The three things concur to bring the attachment within the provisions of Section 67f above mentioned, and the Territorial Court, recognizing the force of that section, ordered the attachment dissolved and the properties then in the possession of the sheriff turned over to the trustee in bankruptcy.

If no sale of the dredge had been made, then both parties concur in the view, that the attachment could have had no effect upon the trustee's title. Can such a sale, had after the adjudication in bankruptcy, operate to defeat the trustee's title merely because the purchaser had no actual knowledge of the bankruptcy proceedings?

(a) No title passed to the purchaser of the dredge, because the proceedings to sell and the sale, were had subsequent to the entry of the order of adjudication in the bankruptcy proceedings.

The dissolution of the attachment was effected by operation of law on April 23, 1906, and not until after that, was any attempt made to sell the dredge. The application to sell was made by a creditor of the bankrupt on May 1, 1906, seven days following the adjudication. If the attachment was dissolved then no shelter can be taken under it by the purchaser, and the proceeding under which he claims to have obtained title to the dredge must be considered as analogous to a separate action, instituted after the adjudication in bankruptcy was entered. It is evident, that no proceeding can be instituted in a state

court to sell assets of a bankrupt, after the same have come into the custody of the bankruptcy court.

Everything had been done in the District Court in Chicago to conserve and hold the assets of the bankrupt for the trustee when he should be elected; the petition alleged that the bankrupt was insolvent and that acts of bankruptcy had been committed; the adjudication determined these facts once and for all times in favor of the creditors and as against the whole world; the exclusive jurisdiction of the bankruptcy court was invoked and the dredge in question placed in *custodia legis*.

By section 70 of the Bankruptcy Act of 1898, the trustee is vested by operation of law with the title of the bankrupt as of the date he is adjudged a bankrupt. The title so granted is not dependent upon whether or not a person dealing with the assets of the bankrupt after adjudication has notice of the bankruptcy proceedings. Our position is, that no title can be obtained subsequent to the adjudication in bankruptcy, no matter how obtained, superior to the title of the trustee.

The same question was before this court upon the construction of the Bankruptcy Act of 1867, in the case of *Conner* v. *Long*, 104 U. S., 228, 231, 232. The Act of 1867 was to the effect, that the law vested title in the assignee *as of the date of the commencement of the bankruptcy proceedings*, and any attachment levied within four months next preceding the filing of the petition in bankruptcy was dissolved. In that case the sheriff attempted to sell perishable

property after the petition in bankruptcy was filed. The court said therein:

> "One consequence is that if property of the debtor, levied on under such an attachment, has been sold prior to the filing of the petition in bankruptcy, but thereafter the proceeds of the sale remain in the hands of the sheriff, or before the assignment have been applied to the payment of the judgment in the attachment suit, the rights of the assignee attach to the money and cannot follow the property sold; for the latter, not being subject to the attachment at the commencement of the bankruptcy proceedings, the title thereto is not thereby transferred to the assignee. * * *
>
> *Another result is, that if the property has been sold under the attachment after the commencement of the bankruptcy proceedings, no title passes by the sale, for the property ceased, at that time, to be the property of the bankrupt, and became the property of the assignee, a stranger to the action and not affected by it; and both the plaintiff in the attachment and the purchaser at the sheriff's sale would be liable to the assignee for a conversion of his property, —the one for having caused its sale, the other for having taken possession of it as owner.*
>
> Upon this point there can scarcely be any diversity of opinion, for it would be difficult to give to this feature of the bankrupt law any less effect without depriving it of all substantial operation, and defeating its obvious policy. It was, undoubtedly, deemed an essential element in any efficient system, the main purpose of which was to secure to all the creditors of the bankrupt an equal participation in his effects, not only as against his fraudulent and collusive dispositions, but also as against the zealous competition among creditors, in their heedless race of diligence, to obtain priority. *For this reason every title to property sought to be ac-*

quired by a seizure and sale under an attachment, belonging to one subsequently declared to be a bankrupt, is defeated, if the attachment be levied within four months next previous to the institution of the bankruptcy proceeding; and the creditor at whose instance and for whose benefit the sale was made, and the purchaser who, having acquired possession of the property, asserts a claim of ownership, are each liable for a tortuous conversion of the property of the assignee, unless, as before stated, the property has been sold under the attachment before the filing of the petition in bankruptcy, in which case the title of the assignee vests in the proceeds of sale."

This court, in the very recent case of *Acme Harvester Company* v. *Beekman Lumber Company*, 222 U. S., 300, 307, re-affirmed these same principles. In that case the following language is used:

"It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. *The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.* It is true that under §70, a, of the Act of 1898 the trustee of the estate, on his appointment and qualification is vested, by operation of law, with the title of the bankrupt as of the date he was adjudicated a bankrupt, *but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the*

filing of the petition, in order that it may be administered under the law, if an adjudication in bankruptcy shall follow the beginning of the proceedings. * * * The filing of the petition asserts the jurisdiction of the Federal Court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. *Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits which would virtually amount to preference in favor of such creditors.*"

It will be observed that the two cases just discussed cite with approval the case of *Bank* v. *Sherman*, 101 U. S., 403. In *Bank* v. *Sherman*, 406, it was stated, for the first time, that the filing of the petition in bankruptcy was a caveat to all the world. Nothing has been said by this court, in any case, called to our attention, which limits the language so used as applied to facts such as are now under consideration. In that case it was said:

"The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus. Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at*

their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee is in all respects just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise the efficacy of the act depended not upon its own language and meaning, but was only what others outside of the proceeding might choose to permit it to be. This would be a solecism, and largely defeat the purpose of the statute and the policy of Congress in enacting it."

Under the Act of 1867, upon adjudication, all titles *related back to the filing of the petition in bankruptcy,* and it was therefore held in *Connor* v. *Long, supra,* that subsequent to the filing of the petition in bankruptcy an innocent purchaser, before adjudication, took no title superior to that of the assignee. And in *Bank* v. *Sherman, supra,* it was said, that those who dealt with the bankrupt's property in the interval between the filing of the petition and the final adjudication, did so at their peril. In *Lamp Chimney Company* v. *Ansonia Brass Company,* 91 U. S., 656, 661, it is was said, that the decree adjudging a corporation a bankrupt was in the nature of a decree *in rem* as respects the status of the corporation.

Under the bankruptcy act of 1898 the title to the bankrupt's property vests, by operation of law, in the trustee *as of the date of adjudication.* The same effect, therefore, must be given to the date of adjudication under the present law, in so far as titles

are concerned, as was given to the date of the filing of the petition in bankruptcy under the law of 1867. Thus it was held in *Mueller* v. *Nugent*, 184 U. S., 1, 14, that on adjudication, title to the bankrupt's property became vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court. And *in re Granite City Bank of Del-Rapids*, 137 Fed. (C. C. A., 8th Cir.), 818, 820, 821, it was said, that the adjudication operates as a seizure of the property of the bankrupt by which it is taken in *custodia legis*. In *Acme Harvester Company* v. *Beckman Lumber Company, supra*, 300, 307, and in *State Bank of Chicago* v. *Cox*, 134 Fed. (C. C. A., 7th Cir.), 91, 93, these same doctrines were expressly approved, and the bankruptcy proceedings are therein held to be so far *in rem* as to place the assets of the bankrupt in *custodia legis* from the time the petition is filed.

In no part of the act of 1898 is there anything from which it can be implied that the title of the trustee is defeasible, but on the contrary thereof the title of the trustee as of the date of adjudication, is not dependent upon any fact, except the title of the bankrupt on that date. Therefore, that a purchaser of the assets of a bankrupt subsequent to adjudication, has no notice of the proceedings in bankruptcy, cannot affect the situation. Sec. 70, e, gives the trustee power to avoid certain transfers of the bankrupt, and recover the property from the person receiving the same, unless he is a *bona fide* holder for value prior to adjudication. It will be observed that the title of such a holder is not dependent upon notice, and by the express language

of the act, such a holder, subsequent to adjudication, obtains no title superior to that of the trustee in bankruptcy. The clear intent and purpose of the act is to make the proceedings to adjudicate, and the adjudication resulting thereby, proceedings *in rem* and constructive notice to all who would deal with the bankrupt's property, and so it was held in the cases *supra*.

Testing the title of the purchaser in this case by these principles, did he obtain any title to the dredge as against the trustee? The attachment as shown was dissolved on April 23, 1906, the date of adjudication; the application or proceeding to sell the dredge was made on May 1, 1906, after the adjudication was entered, and the sale was had June 26th, more than two months subsequent to the date upon which the title of the trustee became fixed. It is contended that, even so, appellee was a purchaser without actual notice of the proceedings in bankruptcy, and that his title therefore supersedes that of the trustee. It will hardly be contended by appellee that his purchase at such a time could defeat the title of the trustee, if at the time thereof he had actual notice of the filing of the petition in bankruptcy. But, as shown, the title of the trustee is not dependent upon the question of notice, and even if it were, the filing of the petition and the adjudication had the effect of constructive notice to appellee with the same force as if he had actual knowledge of these proceedings. To hold otherwise would be to ignore the unequivocal meaning of Section 70, and to say as stated by this court in *Bank* v. *Sherman*, "that the efficacy of the act depended not upon

its own language and meaning, but only what others outside might choose to permit it to be."

If the title of the trustee can be defeated by an innocent purchaser, after adjudication there would be no limit to the time when such would be so, and even after the trustee had been elected and qualified, his title would continue to be defeasible.

For these reasons we insist that the title to the dredge remained in appellant as trustee of the Oro Dredging Company, and that the evidence of appellee that he had no knowledge of the bankruptcy proceedings was immaterial and should be disregarded.

(b) THE PROVISO OF SECTION 67, OF THE BANKRUPTCY ACT OF 1898, IS NO PROTECTION TO APPELLEE, AS THE SAME DOES NOT APPLY TO THE SALE MADE IN THIS CASE, NOR DOES IT UNDER ANY CIRCUMSTANCES CONTEMPLATE A PURCHASER SUBSEQUENT TO AN ADJUDICATION IN BANKRUPTCY.

Some claim has been made and probably will be repeated in this court, that appellee comes within the proviso found in Section 67f, of the Act of 1898, as follows:

> "* * * nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The title of the purchaser in this case cannot be said, under any circumstances, to have been obtained by the attachment or by virtue of any lien created

or sought to be created. The attachment never proceeded to final judgment, but was dissolved upon the adjudication in bankruptcy before the purchaser had entered the case. The title here, is sought to be sustained by reason of a sale of the dredge, in a proceeding instituted after the dissolution of the attachment and which was not dependent upon the lien of the attachment being sustained upon final judgment. The proviso therefore does not apply to this case.

But even if the title of the purchaser were obtained by the attachment, it is evident that the proviso to Section 67f has reference to a title obtained before the adjudication in bankruptcy. The adjudication by the express terms of Sec. 67f, has the effect of dissolving the attachment, and how can it then be said that following the adjudication, there can be a title obtained by an attachment already dissolved? If after an adjudication has been had the attachment is at an end, then no title can be derived through the same. The language of the proviso is consistent only with such a construction, and thus excludes the argument that it could have reference to a title obtained subsequent to an adjudication. And any other construction would be inconsistent with and contrary to the very purpose and intent of the whole act.

The language was inserted to cover a case wherein judgment and sale took place before the petition in bankruptcy was filed, so that titles so derived would be preserved. Such a case is *Clarke* v. *Laremore*, 188 U. S., 486, 488, 490. If the sale in that

case had followed the adjudication no title could then have been taken by the purchaser. The Supreme Court, in that case, speaking of the effect of the bankruptcy proceedings upon the attachment, said:

> "They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy and sale, rested. * * * It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor."

The holdings of the cases cited in the next preceding subdivision of our brief, are to us conclusive of the meaning of the proviso now under consideration. These cases all hold, that the filing of the petition is a caveat to all the world, in effect an attachment and injunction, and that the proceedings are so far *in rem* that the estate is to be regarded as in *custodia legis*. There can be no purchaser without notice after the filing of the petition in bankruptcy.

As shown before there cannot be a sale of the bankrupt's property after adjudication, so as to defeat the title of the trustee, which vests under section 70, as of that date. The proviso to section 67f was not intended as a limitation on section 70, but all titles obtained subsequent to adjudication were made defeasible.

(c) THE SALE IN THIS CASE WAS NOT HAD IN A PROCEEDING TO ENFORCE A PRE-EXISTING LIEN, AND THE JURISDICTION OF THE TERRITORIAL COURT ENDED ALTHOUGH NOT APPEARING UPON ITS OWN RECORD, WHEN THE ADJUDICATION WAS ENTERED IN THE BANKRUPTCY PROCEEDINGS.

Appellee's counsel have heretofore sought comfort in the cases of *Euster* v. *Goff*, 91 U. S., 521, and *Doe* v. *Childress*, 21 Wallace, 642, both decided prior to the cases of *Conner* v. *Long* and *Bank* v. *Sherman*, *supra*. It is significant that the Supreme Court in the two later cases did not criticise the two earlier cases, but on the contrary distinguished the same.

The reason is obvious, as the cases deal entirely with different questions.

In *Euster* v. *Goff* a bill was filed to foreclose a mortgage which was executed prior to four months preceding the filing of the petition in bankruptcy. The bill was filed not to create a lien, *but to enforce a pre-existing lien and one recognized as valid within the terms of the Bankruptcy Act of* 1867, *as well as the Bankruptcy Act of* 1898. It was contended by the defendant, that the proceedings in the foreclosure suit, after the appointment of the assignee in bankruptcy, were absolutely void because the assignee was not made a defendant therein. The court likens the case unto one wherein the defendant in a foreclosure suit transfers the subject matter of the suit pending litigation. We are unable to see the application of that case to the facts now under consideration.

In *Doe* v. *Childress*, *supra*, an attachment suit was started outside of the four months limitation. The suit, therefore, became one recognized as valid by the bankruptcy act. The court said in that case:

> "The title *pendente lite* is transferred by operation of law from the bankrupt to the assignee in bankruptcy. The conveyance of the register operates as would, under ordinary circumstances, the deed of a person having the title, with two differences: first, it relates back to the commencement of the bankruptcy proceeding; second, the register's conveyance dissolves any attachment that has been made within four months previous to the commencement of the bankrupt proceedings. * * *
>
> "Where the power of a state court to proceed in suit is subject to be impeached, it cannot be done except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. This rule gains whether the four months' principle is applicable or whether it is not applicable."

It is the last sentence of the language quoted which appellee's counsel claim controls the situation in the instant case. It is true that the machinery of the state court cannot be stopped as if by magic, but any person purchasing at such a proceeding must take notice of the fact, that in case a petition in bankruptcy has been filed and an adjudication entered thereon, the jurisdiction of the state court is at an end, and any title which he might acquire through such a proceeding is subject to be defeated by the superior title of the trustee in bankruptcy when one is appointed. The distinction is clearly brought out in *Conner* v. *Long*, *supra*, 239, 240, wherein it is said:

"In the present case it is admitted that the state court had full and perfect jurisdiction, in all respects, until it was *terminated by the proceedings in bankruptcy.* But the fact that put an end to its jurisdiction did not appear by its own record, and consequently was one of which the sheriff could not, by legal possibility, have official notice; and without that he was bound to obey the order of that court, to whom he was responsible, directing the sale of the property, which, so far as he was concerned, at the time it was made, was an exercise of jurisdiction as legitimate as the issuing of the original attachment under which the property had been lawfully taken and held. * * * The proceedings in bankruptcy were had in a court of the United States, sitting in the district of Massachusetts. The defendant below was sheriff of a court of the State of New York. It is entirely true that the act of Congress prescribing a uniform rule as to bankruptcies, * * * is the paramount law throughout the territorial jurisdiction of the national government. It is as truly the law of each state, as it is, and because it is, a law of the United States. The assignment in bankruptcy made in one district, so far as its operation is matter of law, operates with the same effect in all districts. And it operates upon the title to the property of the bankrupt wherever it is situate, so as to preserve it, according to the provisions of the act, for distribution under it, and so that the title shall pass, as it requires, without regard to any dealing with it, which it forbids. Whatever hardships, if any, *may follow to private persons who sell or buy it, and attempt to divert it to their own use, falls upon them, as in other cases where titles fail, even in the hands of innocent, because of ignorant, purchasers.* But they are volunteers, seeking only their private interests, and take the chances of all the con-

> sequences of their conduct. The maxim to which they are subject is '*caveat emptor.*' * * * The language of Mr. Justice Miller in delivering the opinion of this court in *Eyster* v. *Gaff*, 91 U. S., 521, 524, though spoken in reference to a different state of facts, is applicable to the present case."

Thus we find that where the sheriff is protected, a purchaser at the sheriff's sale would not receive the same protection. Likewise, although the machinery of the Territorial District Court may have continued until notice of the bankruptcy proceedings were brought to its attention, yet its jurisdiction had terminated, and the title of the purchaser obtained therein was subject to be defeated by the express provisions of the national bankruptcy act. *Eyster* v. *Gaff*, which is distinguished in *Conner* v. *Long*, is supported by *Doe* v. *Childress*, *supra*, and the distinction of one of these cases constitutes a distinction of both of them.

In cases to enforce a pre-existing lien recognized as valid by the bankruptcy act, the jurisdiction of the state court is concurrent with that of the bankruptcy court. But the state court has no jurisdiction after bankruptcy proceedings have intervened either to create a lien or to sell the assets of the bankrupt, as in such matters the jurisdiction of the bankruptcy court is exclusive.

Mr. Chief Justice Fuller said *in re Watts and Sachs*, 190 U. S., 1, 27, 30:

> "*The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and cor-*

porations, is essentially exclusive. Necessarily when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. *Such cases are not cases of adverse possession, or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings.* The general rule as between courts of concurrent jurisdiction is, that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, *but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent.* * * *

In order to the adequate enforcement of the provisions of the bankruptcy law, *it is necessary that the powers of courts in bankruptcy should be, as they are, most comprehensive.*"

This court has repeatedly so held, and to the same effect is *Harvester Company* v. *Beekman Lumber Company, supra.*

(d) PERISHABLE PROPERTY, LIKE ALL OTHER PROPERTY OF THE BANKRUPT, MUST BE SOLD IN THE BANKRUPTCY COURT.

It will be contended by appellee, that the instant case is to be distinguished from the cases cited, because the property in question was perishable. We will discuss the question of whether or not a mining dredge, made of wood, iron and steel, is perishable property, a little later. But perishable property comes into the custody of the bankruptcy court as well as other property, and if neces-

sary may be sold therein prior to the appointment of the trustee.

In this connection it will be observed that the sale in *Conner* v. *Long, supra*, was of perishable property before final judgment, and in that particular the case is identical with this one. Therein this court said the sale could not defeat the title of the assignee in bankruptcy.

The dredge was within the custody of the District Court of the United States, and it rested with that court to say how the property should be sold, and whether or not the same was perishable, and whether or not the same should be sold as perishable property.

General order XVIII in bankruptcy was prescribed by this court in pursuance of Sec. 30 of the Bankruptcy Act, as follows:

> "Sale of Property. * * *
>
> 3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated, and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."

In this case we find an attachment rendered null and void by an adjudication in bankruptcy, in which the plaintiff, a creditor of the bankruptcy estate, applied to the court to sell a portion of the bankrupt's property as perishable. The same applica-

tion could have been made in the bankruptcy court and, as we maintain, could not be made in any other court.

The bankruptcy act did not contemplate that creditors could ask another court to sell the bankrupt's property as perishable property at any time after the petition in bankruptcy was filed. The doctrine laid down in the case of *Acme Harvester Company* v. *Beekman, supra*, and in *re Watts & Sachs, supra*, to the effect that the jurisdiction of the bankruptcy court is exclusive and so far *in rem* that the property is considered in *custodia legis*, seems conclusive of the right of the plaintiff in the attachment to apply to the territorial district court for a sale of the mining dredge as perishable property.

If the jurisdiction of the District Court sitting in Chicago was exclusive, and it had power to deal with the property as it saw fit, to sell it if it were perishable property, to keep it, if in its judgment it was not perishable property, then by what authority, or valid proceeding, could a creditor invoke the aid of another court, the jurisdiction of which was not concurrent, so as to convey title to the assets of the bankrupt. If such a title can be sustained, then property of a bankrupt is never safe, for the courts cannot guess that bankruptcy proceedings are pending, and any creditor could force the property into the hands of a sheriff by attachment and rush to a sale, and thus convey title to a purchaser who could not be shown to have had actual knowledge of the bankruptcy proceedings. It is evident that

such proceedings are contrary not only to the express provisions of the act, but to the purpose and intent of the act. If it were not so it would be impossible to have a uniform system of bankruptcy throughout the United States under a National Bankruptcy Act.

Counsel claim the right to sell under the ruling of *Young* v. *Kellar*, 94 Mo., 581, wherein the court gave expression to the doctrine of a sale *ex necessitate*. Such sales are rare and should, if at all, be conducted with great caution. It was for the Bankruptcy Court, in this case, to say if such a sale were necessary, and the creditor cannot defeat its jurisdiction by proceeding in the wrong court. Does such a doctrine give a party a right to go into another court and seek relief because the court in whose custody the property lies, does not see fit to order a sale?

The greatest force that can be given to appellee's position is that a court, having possession of the dredge, ordered a sale thereof because it found that the dredge was perishable property. That appellee purchased the dredge, relying upon such finding and without knowledge on his part or on the part of the court, that jurisdiction to sell the same had terminated. It is thereupon contended by the purchaser, that his title is in nowise dependent upon the validity of the attachment or whether or not the title became vested in the trustee as of the date of adjudication; that a sale *ex necessitate*, such as is discussed in *Young* v. *Kellar*, *supra*, being for the interest of all parties, determined the validity of the sale and the title of the purchaser obtained thereby.

That such may be the case where property has not been, by express enactment of Congress, placed in the custody of the Bankruptcy Court, we are not concerned. *But where, as in this case, bankruptcy proceedings have intervened and the property placed within the exclusive jurisdiction and custody of the Federal Court*, it is obvious *that the necessity for such a sale in the State Court is removed*, and the Bankruptcy Court has ample power to protect all parties whose rights may be affected. There never could have been a final judgment in the attachment proceedings because the property was then in the custody of the bankruptcy court. The *object and necessity for an immediate sale in the attachment suit were gone*, and such went to the very foundation of the jurisdiction of the territorial court to order the sale.

Want of knowledge of the bankruptcy proceedings on the part of the court and the purchaser could not alter the case. That the court proceeded unconscious of the fact, that there was no necessity for its protecting hand and that its jurisdiction had terminated, could not give jurisdiction where there was none. All that the court sought to do in this case was to preserve the property so it would not be lost and that was accomplished before the fact was made known to it. And in so far as the purchaser is concerned he, like all other purchasers at judicial sales, is subject to the rule of *caveat emptor*. He may not have had actual notice, but under the law, constructive notice and that there was no jurisdiction to sell were sufficient to deprive him of his title.

The doctrine of sales *ex necessitate*, is not dependent upon whether or not the purchaser has notice of a title standing in another not a party to the proceeding in which such a sale may be had. In fact, where such sales are allowed, the true owner may be present, asserting his title, but the sale goes on nevertheless on the theory that the court cannot stop to determine titles where the property is wasting away. Therefore, if appellee's argument in this case is sound, it must stand the test, where bankruptcy proceedings have intervened, in a case where the trustee has appeared and asserted his superior title by virtue of an adjudication in bankruptcy, before the sale is had. Would the purchaser then obtain a title at such a sale superior to that of the trustee? We think not, for, by the express provisions of the bankruptcy act and the decisions of the court construing the same, no valid sale could be had. Appellee's counsel will hardly contend, that if the bankruptcy proceedings were known to the purchaser, that he would, at the sale in this case, have acquired a title superior to that of the trustee in bankruptcy.

II.

ASSUMING THE JURISDICTION OF THE TERRITORIAL COURT TO SELL THE DREDGE AS PERISHABLE PROPERTY, WAS CONCURRENT WITH THAT OF THE BANKRUPTCY COURT, IT REMAINS

(a) THAT THE DREDGE WAS NOT PERISHABLE PROPERTY WITHIN THE MEANING OF THESE WORDS, AS CONTEMPLATED BY THE SALE OF PERISHABLE PROPERTY IN BANKRUPTCY PROCEEDINGS;

(b) THAT THE DREDGE WAS NOT PERISHABLE PROPERTY WITHIN THE MEANING OF THE STATUTE OF THE TERRITORY OF NEW MEXICO, RELATING TO SALES OF PROPERTY OF A PERISHABLE NATURE AND LIABLE TO BE LOST BEFORE FINAL JUDGMENT;

(c) THAT THE PROCEEDINGS TO SELL THE DREDGE WERE IRREGULAR AND UNWARRANTED AND NOT SUCH AS WERE CONTEMPLATED BY THE STATUTE.

We are satisfied that the sale of the dredge to appellee passed no title superior to that of the Trustee in Bankruptcy for the reasons hereinbefore stated. It remains however, that an attempt was made to sell the dredge as perishable property, a fact difficult to consider without some misgivings as to the sincerity of the parties applying for the sale, as well as the purchaser thereof.

The dredge was made of wood, iron and steel. It was represented to the court on March 19th, that the same was in danger of high water and a receiver was appointed to conserve and protect it. (Rec., 16.) A month and a half later and on May

first, a motion was made to sell the dredge, on the ground that it was perishable property, and although the court entered a finding that it was expensive to keep and was deteriorating in value, no sale was attempted until June 26, almost two months after the order of sale was entered, and more than four months since the suit had been started.

The dredge was not destroyed and it remains where it was at the time of the sale thereof. The funds paid by the purchaser are on deposit with the clerk of the court and the Trustee seeks the dredge so that the mining plant or properties may be sold as a whole, for the benefit of all the creditors in the bankruptcy proceedings.

(a) THE DREDGE WAS NOT PERISHABLE PROPERTY WITHIN THE MEANING OF THESE WORDS, AS CONTEMPLATED BY THE SALE OF PERISHABLE PROPERTY IN BANKRUPTCY PROCEEDINGS.

The dredge was in the custody of the Bankruptcy Court and no action was taken by any one in that court to sell the same. *There is a presumption that the dredge was not perishable property, from the fact that the Bankruptcy Court took no action to sell it as such.*

In *Bryan* v. *Bernheimer*, 181 U. S., 188, it was held that the bankruptcy court had jurisdiction in a summary proceeding to try the title to goods sold after the petition in bankruptcy was filed but before adjudication. If jurisdiction in that case was so vested in the bankruptcy court, it was so in this case where the sale was after adjudication. The

question then, assuming there could be such a sale in the territorial court, of whether or not the dredge was perishable was one to be determined as measured by the bankruptcy act.

The Bankruptcy Act is the paramount law of the land when winding up proceedings have been commenced, and when the trustee showed, that the dredge was a valuable part of the bankrupt's properties and not such as a court of bankruptcy would have ordered sold before the trustee was appointed, it then became the duty of the Territorial Court to vacate the sale so made to appellee. The findings of the trial court at the time the sale was made, could not affect the situation in the least. These findings are not such as would warrant a sale of the dredge as perishable property in the bankruptcy court, and the fact remains upon the record, that the dredge was not destroyed and was not expensive to keep in the sense that it ought to have been sold.

The dredge, together with the mining lands, constitute a plant or mining property and the cost of the dredge to such plant or property was $75,000, as shown by the affidavit of plaintiff in the attachment suit (Rec., 14), and about $100,000, as shown by the receiver's notice of sale (Rec., 63). The dredge could be protected from floods by embankments and ditches which should be repaired and renewed from time to time (Rec., 73), and the trial court found that the dredge could be conserved and protected by an expenditure of not to exceed a thousand dollars, which amount was then considered by all parties to be reasonable (Rec., 16). Upon these facts, and upon the additional evidence of an attor-

ney for the plaintiff in another attachment suit (Rec., 24). the trial court entered a finding, that it was expensive to protect and conserve the dredge, and that the same was deteriorating in value, upon which findings a sale thereof was ordered. The dredge was conserved, and as late as October 9, 1907, a year and a half after the court found it was expensive to keep the dredge, it is admitted that the actual cost of keeping the same *including insurance* was about $1500. (Rec., 72.)

The actual expense for keeping the dredge up to the time the trustee appeared is not shown, but if $1500 covered the cost to October 9, 1907, the cost from May 1, 1906 to August 2nd of the same year could not have exceeded $500. And although the order of sale was made on May 1, 1906, no sale was made until June 26th, at a time when the spring floods were passed. No claim was made by the receiver (Rec., 24) for expenses in protecting the dredge from the time of his appointment on March 21st to July 19th when he presented his report. (Rec., 25.)

What District Court sitting in bankruptcy would have ordered a sale of such a piece of property, separate and apart from the mining lands, before the trustee in bankruptcy was elected? It is admitted that the dredge could be insured (Rec., 72), and it would have been the duty of a receiver in bankruptcy to insure the same and hold it for the trustee to be sold after notice to the creditors. The plant or properties of the bankrupt could not be operated without the dredge, and to separate the properties would be to greatly depreciate the value of both.

The facts show conclusively that the property was not such as would have been sold in the bankruptcy court as perishable property and it is unreasonable to say, that a different meaning should be given to the word perishable because the sale was made in another court.

The general order of the Supreme Court provides only for the sale of perishable property, and it must be shown that there will be a loss if the same is not sold immediately.

A distinction exists between property that is of a perishable nature, and such as is simply liable to deteriorate in value. The first refers to that which has intrinsic physical perishability, whereas the latter is much broader and covers that which depreciates in value from exterior causes. The fact that the Supreme Court in adopting the general order in bankruptcy providing for the sale of such property, only provided for the sale of perishable property, raises the presumption that the order was not intended to include property that was liable to deteriorate in value from exterior causes. And it is self-evident that the purpose of the act was not to authorize the sale of any of the bankrupt's assets without actual notice to the creditors, and, therefore, any sale made under the general order above mentioned, without notice to creditors, should only be made in an extreme case.

(b) THE DREDGE WAS NOT PERISHABLE PROPERTY WITHIN THE MEANING OF THE STATUTE OF THE TERRITORY OF NEW MEXICO, AND THERE WAS NO FOUNDATION FOR A SALE THEREOF AS SUCH, BEFORE FINAL JUDGMENT.

The statute under which the sale of said dredge was made is Section 2716 of the Compiled Laws of New Mexico of 1897, which provides as follows:

> "In all suits in the district courts by attachments, *when the property attached shall be of a perishable nature*, and liable to be lost or diminished in value before the final adjudication of the case, and the defendant shall not give bond to retain possession of the same, *the plaintiff or defendant may make out a petition in writing setting forth the kind, nature and condition of the property, and present said petition to the judge of the district in vacation; and if he shall find it sufficient in form and conditions*, he may hear the testimony of witnesses as to the property, and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property, may order such sale to be made and direct the manner thereof."

The property to be sold under the statute must be of *a perishable nature*, and must be liable to be lost or diminished in value before the final adjudication of the case. In order to authorize the sale of property as perishable or to justify a resort to the statutory remedy, the property should come within the contemplation of the statute. We recognize that such statutes have not always been given the same construction in their application, but the best authority limits the meaning of the words "perishable property" to property of an inherent tendency to decay and leaves it to the legislature to say when

property liable to be lost by fire or exposure may be sold.

In this case the words used in the statute are expressive of an intention to limit the meaning of the word "perishable" rather than to extend it. The words "property of a perishable nature" have express reference to an inherent quality in the property, for the word "nature" could not mean a condition surrounding the property. The words exclude any other meaning as all property is subject to destruction, and if such were intended there was no necessity for expressing it as we find it stated in the statute.

The Territorial Supreme Court adopts the views expressed in the case of *McCreery* v. *Berney Nat. Bank*, 116 Ala., 224, 22 So., 577. In that case the statute provided that perishable property might be sold, whereas in this case it is property of a perishable nature, and there is a vast difference between a stock of dry goods in a rented building and a mining dredge made of wood, iron and steel, and located upon the premises of the defendant in the attachment suit.

The construction made by the court below is also supported by the argument, that because the statute gives the judge authority to hear evidence indicates an intention to leave the question of what kind of property was to be sold, to the court. But the statute, in express terms, defines the kind of property that may be sold and it must also be such as is "liable to be lost or diminished in value before final judgment." The purpose of taking evidence is to

determine if the property sought to be sold is of the kind mentioned in the statute, and not to enlarge the powers of the court.

In *Mosher* v. *Bay Circuit Judge*, 108 Michigan, 579, 66 N. W., 478, the plaintiff in an attachment suit asked for and obtained an order for the sale of shingles and lumber on the ground that the property was perishable, and the claim set up in support of the order was that the property was so situated that it was liable to be destroyed by fire, and that the insurance which had before been carried had been cancelled, and that the sheriff was unable to re-insure, except for a small amount. On application to the Supreme Court for mandamus to compel the judge to set aside the order, the Supreme Court held that the property was not perishable within the meaning of the statute. The court, in its opinion, said:

> "We think the order must be set aside. The property attached is not perishable within the meaning of the statute. It provides that when any of the property taken in attachment shall consist of animals or perishable property, the court, or any judge thereof, may make an order directing such property to be sold, and the money arising from such sale to be brought into court to abide the order of such court. There is no power vested in the Circuit Court or Circuit Judge to make an order for sale of perishable property except the power conferred by statute, and we think this is not perishable property within the meaning of the statute. The writ must be granted as prayed."

The language found in *Oneida National Bank* v. *Paldi*, 2 Mich. N. P., 221, is in point. In that case the property consisted of a portable engine and

boilers, a lath and shingle mill, gearing, belting, shafting and other machinery, situated at a remote place in the woods, and that it was liable to loss by trespass and theft, or otherwise, as then situated; that to keep it safely required two watchmen at a cost of four dollars per day, and that if so held until judgment passed it would cost about five hundred dollars, whereas the whole value was about three thousand dollars. The court said:

> "It does not occur to me that the property described comes within the class of property meant or intended by the statute under the designation of 'perishable.'
>
> I think the statute means property perishable in its own nature or character, and not property that is or may be subject or liable to loss by trespass, larceny or fire.
>
> If such is not the meaning of the statute then a stock of goods or almost any possible description of property may be put in the class of perishable, if it happens to be in an exposed condition or situation.
>
> If all such exposed property was intended to be covered by the statute, why did not the statute distinctly and in terms include property liable to loss by trespass, theft, or fire, or by exposure?"

We find another decision to the same effect in *Newman* v. *Kane*, 9 Nev., 234. It is held that under the statute providing:

> "If any of the property attached be perishable, the sheriff shall sell the same in the manner in which such property is sold on execution,"

that hay attached in the field is not perishable property.

The court in its opinion said:

> "The term 'perishable property' as used in the statute providing for its speedy sale when seized on attachment (Practice Act, Sec. 133) applies only to property which is necessarily subject to immediate decay; and does not apply to property, like hay, which could with ordinary or reasonable care, appropriate to its particular species, be preserved.
>
> When a sheriff attaches personal property he is not allowed, under the statute to consider the element of expense in its preservation or keeping, but is bound to have it ready to be disposed of according to the judgment unless compelled to sell on account of its being perishable; and it is no excuse for a failure to have it so ready that the best interest of the parties were subserved by a sale."

Again in the case of *Goodman* v. *Moss*, 64 Miss., 303, 1 So. Rep., 241, the Supreme Court of Mississippi held that railroad ties were not perishable property although exposed to destruction by fire, and in so holding the court used this language:

> "Because cross-ties for a railroad track are liable to be destroyed by fire, and there was considerable danger of fire at the time, it was concluded that an immediate sale should be made on short notice, and they were sold. Alas! all things terrestrial are destructive, and this earth is finally to yield to the destructive agency of fire, we are told; but the fire test is not the true one in the contemplation of the statute. The danger of immediate waste and decay to which it applies is that arising *from the inherent nature and qualities of the goods and chattels which render them liable to immediate waste and decay.* The construction of the statute under which this sale was made would make a sale proper in most instances where personal property is levied on, for the durable qualities

> of hardwood cross-ties for a railroad bed must equal or exceed those of a very large list of articles. The purpose of the statute is to provide for the conversion into money on short notice of goods and chattels which will not keep because of their liability to speedy decay or waste."

And in *In re Weis et al.* v. *Basket*, 71 Miss., 771, 15 So. Rep., 659, the Supreme Court of Mississippi, under a statute authorizing the officer to sell attached goods, after another person has interposed a claim, only when the goods are live stock or chattels which it is expensive to keep, or perishable articles, held, that baled cotton cannot be sold.

Cooper, J., in his opinion, says:

> "After Weis & Co. had interposed a claim to the property seized under the attachment for rent sued out by Weis & Goldstein against Bright & Connerly, the officer had no authority to sell, unless the property seized was 'horses, mules, or other live stock, or chattels which it was expensive to keep, or perishable articles.' * * * Cotton ginned and baled is not of a class of chattels expensive to keep or perishable in its nature, within the meaning of the law; citing *Goodman* v. *Moss*, 64 Miss., 307, 1 So., 241. So far as is disclosed by this record, Weis & Goldstein were not landlords of Bright & Connerly, and they had no right to sue out the attachments for rent under which the cotton was seized. Judgment reversed and remanded."

The dredge in question is hardly perishable in its nature, and unless the statute contains a provision authorizing a sale where such property is subject to loss by surrounding danger, there can be no semblance of an excuse for the sale in the instant

case. There is nothing in the statute as we read it providing for sales of property so situated.

It is to be observed that the statute provides for the sale of property of a perishable nature *and* liable to be lost or diminished in value before final adjudication. The statute does not provide for the sale of property of a perishable nature *or such* as is liable to be lost or diminished in value, but on the contrary thereof, it must not only be property of a perishable nature, but property of that kind must also be liable to be lost or diminished in value before final adjudication.

That the hearing had before the trial court upon the application to appoint a receiver, showed that the danger surrounding the dredge was that of high water, and that the danger could be minimized by repairing the embankments (Rec., 14, 15), and that the receiver was directed on March 19, to protect and conserve the dredge; that the evidence upon the trial of this cause showed, that the dredge was located in a pond made by water from a ditch leading to the creek (Rec., 133), and could be protected from floods by repairing and renewing, from time to time, the embankments and ditches (Rec., 134); that the dredge was in fact, not sold until mid-summer, after the danger from high water had passed; that it was preserved for a long time at comparatively little expense, and that at the time of the trial of the cause the dredge was then intact; convinces the reasonable mind that the dredge made of wood, iron and steel was not property of a perishable nature, nor was the same such property as was liable to be lost or diminished in value before

final adjudication. Therefore, even if the statute of the territory is to receive the construction given to it by the territorial Supreme Court, the sale of the dredge as perishable property within that construction, was erroneous.

The finding of the trial court that the dredge was expensive to protect and conserve, and that the same was deteriorating in value, and that it was for the best interest of the defendant, as well as of the creditors and all parties, that a speedy sale of the dredge be had, does not alter the situation. These findings do not even show, that the dredge was property liable to be lost or diminished in value before final adjudication. All property may be said to deteriorate in value, and may be expensive to protect and conserve, and yet would not be property of a perishable nature, such as is contemplated by the statute above mentioned, no matter what construction is followed.

(c) THE PROCEEDINGS TO SELL THE DREDGE WERE IRREGULAR AND UNWARRANTED, AND NOT SUCH AS WERE CONTEMPLATED BY THE STATUTE.

The statute of the territory authorizing a sale of perishable property, contemplated prompt action at the time of the levy of an attachment, and pending service on the defendant.

Service by publication was had upon the defendant, the Oro Dredging Company, and was completed, as shown by the proof of service, on April 18, 1906 (Rec., 20). On May 1st of the same year, the parties were before the court and procared an order

directing the clerk to enter the appearance of the defendant, upon a showing that proof of service had been made, and no appearance had been filed. On the same day a motion was made to sell the dredge, under a statute which provided that a sale of property may be made which was of a perishable nature *and liable to be lost or diminished in value before adjudication.* If service on the defendant was complete on April 18, 1906, what was there to prevent the plaintiff from taking his judgment against the defendant? If the plaintiff was entitled to a judgment as by default on May 1, 1906, when the order of sale was entered, how can it be said that the sale was to prevent loss before final adjudication?

The statutes of the territory provide,—Sec. 2685, Sub-Sec. 106,—that in actions where the service of summons is by publication, the plaintiff may, upon proof of publication, and no answer having been filed, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and may render judgment for the amount which the plaintiff is entitled to recover. And Sub-Sec. 103 of Sec. 2685 above mentioned, provides that any judgment or decree, except cases where trial by jury is necessary, may be rendered by the judge of the District Court at any place where he may be in his district, and the District Courts, except for jury trials, are declared to be at all times in session for all purposes. It is therefore apparent that the plaintiff was entitled to and could have procured a final judgment upon the record of the cause on May 1, 1906, the same

day, that an application was made for the sale of the dredge, on the grounds that it was liable to be lost or diminished in value before final adjudication.

The irregularity of that proceeding was of course known to the purchaser, and it is self-evident that no such proceeding as was attempted could be had under the statute upon which the proceeding is founded.

The parties who applied for the sale must have known that any final judgment would have been void on account of the bankruptcy proceedings, and therefore sought in an irregular and unwarranted proceeding to remove the possession of the dredge from the bankruptcy court. Upon no other theory could the plaintiff have applied for a sale at the time the application was made in this case.

The irregularity extended even to the form of the application. The statute provides that a petition must be filed and that the same must be found not only sufficient in conditions, but also in form. In this case no petition was filed setting out the kind, nature and condition of the property, as required by statute. The written application was for the appointment of a receiver to take charge of, and conserve the dredge and protect it from high water. Such an application cannot be the foundation of an order of sale, under a statute which requires a formal petition to be filed for the purpose of determining jurisdictional facts, upon which a sale could be ordered. The petition which was filed was inconsistent with an application to sell, as it contemplated retaining the dredge in the possession of a receiver and conserving it until final judgment.

III.

THE SALE OF THE DREDGE WAS NOT CONFIRMED BEFORE THE PURCHASER HAD ACTUAL KNOWLEDGE OF THE BANKRUPTCY PROCEEDINGS.

It is said that Charles Springer had no actual notice of the bankruptcy proceedings. Whatever may have been the fact at the time of the sale conducted by the receiver of the Territorial Court, the trustee in bankruptcy intervened on August 2, 1906, and the sale to Springer had not then been confirmed by the court. The sale was, therefore, at the time the trustee in bankruptcy appeared in the proceedings incomplete, and the dredge should have been immediately ordered turned over to the trustee.

The Territorial Supreme Court found, that the sale of the dredge to Springer was confirmed July 17, 1906, but such finding is based entirely upon the pleadings in the case. The entire record is before this court and nowhere is there found any confirmation of the sale of the dredge.

It is alleged in the intervening petition of the trustee, that an order was entered herein purporting to approve said sale (Rec., 55), and in the sworn answer of Charles Springer it is alleged that an order was entered approving and confirming the final report of the receiver. (Rec., 64.) Upon these allegations the Supreme Court of the territory found that the sale had been confirmed. It is claimed by appellee, that the sworn answer is conclusive under the territorial practice, because the fact was not

denied under oath. However such may be as to facts not appearing upon the record of a proceeding, no oath of a party can change the record as made.

In case appellee desires to rely upon the fact, we admit that an order was entered in another attachment suit purporting to approve and confirm the final report of the receiver. But we contend that any such order was erroneously entered, and cannot be relied upon as a confirmation of the sale had in this proceeding. Even after the trustee appeared in this cause an application was made to confirm the sale, but it was withdrawn upon motion of appellee. (Rec., 65.)

If the trustee in bankruptcy qualified on July 16, before the sale to Springer was complete, and title to the bankrupt's assets passed to him as of the date of adjudication, how could an order of the territorial court on July 17th, confirm title to the dredge in appellee?

It is a well established rule that a judicial sale is not complete until the sale has been confirmed by the court.

And even if the finding of the lower court, that the sale was confirmed on July 17th, is to stand, *the same court found that the purchaser did not know of the bankruptcy proceedings until two weeks after the time of his purchase at the sale.* (Rec., 133.) The sale was had on June 26th, therefore the purchaser had actual knowledge of the bankruptcy proceedings before the attempted confirmation of the sale.

It is evident that the mining plant or properties of the bankrupt are of greater value to the creditors of this bankruptcy estate than a few acres of placer land with no means to operate the same.

No party could have proceeded as the purchaser did in this case without making some inquiry into the reason and object of the sale at the time it was made. The plaintiff in the suit was a large creditor and a stockholder of the defendant company and appeared so upon the record, and yet he was the moving party to sell the dredge as perishable property. The record showed, that notice of the appointment of the receiver had been sent to the stockholders of the company, which disclosed, that for some reason the defendant company could not respond, presumably because it was in the hands of a receiver. The dredge was held for four months, and the defendant had not appeared. No default judgment was taken, as might have been done, on the same day the order of sale was obtained. Such facts, and that the dredge was made of wood, iron and steel, must have aroused the inquiry of the purchaser.

The money paid by the purchaser is there in court, and if he is entitled to be rewarded for his care of the dredge pending this litigation, the bankruptcy court, a court of equity, is open to him and he can there present his claim for such.

We ask that the judgment of the Territorial Su-

preme Court be reversed and that the possession of said dredge be awarded to appellant herein, free and clear of all claims of appellee.

Respectfully submitted.

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Attorneys for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. [redacted]23.

FRANK H. JONES, TRUSTEE IN BANKRUPTCY OF THE OBO DREDGING COMPANY, A BANKRUPT, INTERVENER, APPELLANT,

vs.

CHARLES SPRINGER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR APPELLEE.

CHARLES A. SPIESS,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 240.

FRANK H. JONES, TRUSTEE IN BANKRUPTCY OF THE ORO DREDGING COMPANY, A BANKRUPT, INTERVENER, APPELLANT,

vs.

CHARLES SPRINGER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR APPELLEE.

Statement.

On February 23, 1906, certain residents of Colfax county, New Mexico, as creditors, commenced attachment proceedings against an Illinois corporation, the Oro Dredging Company, which was doing business in Colfax county, New Mexico, for the purpose of enforcing the collection of certain

accounts which they held against that corporation. These actions were regularly commenced in the district court of Colfax county and writs of attachment were regularly issued out of that court whereby the sheriff of that county was directed and commanded to levy the writs of attachment upon the property of the Oro Dredging Company (R., 5-9).

The sheriff, pursuant to the command of the writs, seized, among other things, A MINING DREDGE, THE TITLE TO WHICH IS THE ONLY MATTER HERE IN DISPUTE. The dredge was seized by the sheriff on the 27th day of February, 1906, he levying thereon and actually taking the same into his possession (R., 12). On the 19th day of March, A. D. 1906, on application by the plaintiffs in the attachment suits, James K. Hunt was appointed the receiver to conserve the dredge (R., 15). On the 1st day of May, 1906, a petition was duly presented to the judge of the district court of Colfax county for an order directing the sale of the mining dredge, it being alleged therefor that the dredge was of a perishable nature and was liable to deteriorate in value before the final adjudication of the case, and the judge, after hearing and considering the testimony of witnesses and after finding that the defendant corporation had not given bond to retain possession of the dredge, and after finding that the dredge was of a perishable nature and liable to be lost or diminished in value before the final adjudication of the case, directed

the receiver, James K. Hunt, to sell the dredge and equipment after giving the usual notice of the sale by publication (R., 24).

The receiver caused the publication to be made as directed, and on the 26th day of June, 1906, at Raton, the county seat of Colfax county, New Mexico, offered the dredge for sale to the highest bidder for cash. Charles Springer, the appellee herein, was the highest and best bidder for the dredge, paying therefor the sum of five thousand dollars (R., 25). On July 17, 1906, the sale of the dredge was duly confirmed and approved. On the sale of the dredge to Charles Springer he took possession thereof and its equipment and has ever since that time remained in possession thereof. (Findings 6 and 7, R., 132.)

The causes in which the orders were made directing the sale of the dredge and confirming the sale thereof proceeded just as any other causes might or would proceed. The district court of Colfax county had jurisdiction of the subject-matter of the actions and had jurisdiction of the *rem*, which its officer, the sheriff, put in the hands of the court.

On August 2, 1906, Frank H. Jones, styling himself a trustee for the bankrupt, the Oro Dredging Company, filed an intervening petition in the attachment suits (R., 26) whereby he alleged that on the 12th day of March, 1906, a petition in bankruptcy had been filed in the district court for the northern district of Illinois against the Oro

Dredging Company, and that on the 23d day of April following the Oro Dredging Company was adjudged a bankrupt and that on the 9th day of July following he, the said Frank H. Jones, had been duly appointed trustee in bankruptcy for said Oro Dredging Company and that he duly qualified as such trustee on the 16th day of July, 1906. The appearance of Frank H. Jones, trustee, was first entered in the causes wherein the dredge had been sold, on the 2d day of August, A. D. 1906, and there had not been, prior to the 2d day of August, 1906, any pleadings or papers of any description whatsoever filed in the cause advising the district court of Colfax county or the parties to the attachment proceedings or Charles Springer, the purchaser of the dredge, that the petition for the adjudication in bankruptcy of the defendant company had been filed, or advising the district court of Colfax county or the judge thereof or Charles Springer that the defendant company had been adjudged a bankrupt. The Supreme Court of New Mexico, by its findings of fact (Finding 12, R., 132), found that Charles Springer, prior to the time he purchased the dredge and equipment as aforesaid, had no knowledge or notice of any kind that proceedings of any nature or character whatsoever had been commenced in the district court of the United States for the northern district of Illinois for the purpose of causing the Oro Dredging Company to be adjudicated a bankrupt (Finding 12, R., 132),

and that he, the said Charles Springer, purchased the mining dredge and equipment for the sum of five thousand dollars and that that sum was a fair and adequate price for the dredge and equipment aforesaid at the time of the sale in its then condition and situation, and acquired the same without notice or reasonable cause for inquiry as to whether or not there had been commenced proceedings in bankruptcy against the said defendant, the Oro Dredging Company, and had no knowledge or notice at the time of his said purchase at the sale aforesaid that the defendant company was insolvent (Findings 9, 12, 13, R., 133).

Upon this state of facts the only question in dispute is, Has the trustee in bankruptcy or Charles Springer the title to the dredge? Springer's title to the dredge is sustained upon three distinct grounds, any one of which, standing alone, vindicates the position of the Supreme Court of New Mexico in adjudging the title of the dredge in Charles Springer.

I.

APPELLEE, CHARLES SPRINGER, PURCHASED THE DREDGE AT A SALE ORDERED BY THE JUDGE OF THE DISTRICT COURT OF COLFAX COUNTY, THE DISTRICT COURT OF COLFAX COUNTY DIRECTING THE SALE THEREOF IN THE RIGHTFUL EXERCISE OF CONCEDED JURISDICTION WITHOUT KNOWLEDGE ON THE PART OF THE COURT OR ON THE PART OF SPRINGER OF THE PENDENCY OF THE BANKRUPTCY PROCEEDINGS IN ILLINOIS, AND HE THEREFORE OBTAINED A PERFECT TITLE TO THE DREDGE.

If no proceedings in bankruptcy had been commenced, then confessedly Springer's title would be unquestioned. That being so, have the bankruptcy proceedings intervened so as to prevent Springer from acquiring title?

It will be observed that everything had been done by the district court of Colfax county which could be done to perfect the title of Springer. There was an adjudication by the local court in a proceeding before the court that the dredge was perishable property, or property liable to be lost or diminish in value, an order directing its sale was made, the order was carried out and the sale was actually made and then the sale was actually confirmed, and all this prior to any notice of the bankruptcy proceedings having been brought to the attention of the court or the litigating parties.

The questions involved here are ruled by the case of *Eyster vs. Gaff*, 91 U. S., 521.

In that case the court considered a question exactly similar to the one at bar, and wherein the facts were that while a proceeding was pending in the territorial courts of the Territory of Colorado a bankruptcy proceeding had also been commenced and was in progress, but the Colorado court was not apprised of the fact of the bankruptcy proceedings during the progress of its own suit. Among other things, this court said:

> "It is a mistake to suppose that a bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.
>
> "The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governs such a suit, to do so. IT COULD NOT TAKE JUDICIAL NOTICE OF THE PROCEEDINGS IN BANKRUPTCY IN ANOTHER COURT, however seriously they might have affected the rights of the parties to the suit already pending.
>
> "It was the duty of that court to proceed to a decree as between the parties before it until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duties as the case stood in that court, we are at loss to see how its decree can be treated as void. It is almost certain that if at any stage of the proceed-

ing before sale, or final confirmation, the assignee had intervened, he would have been heard to assert any right he had or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion, to be made a party or to take part in the case, deserved no attention, and received none. In the absence of any appearance by the assignee the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other courts except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property, or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view."

In the case of *Doe vs. Childers*, 21 Wallace, 642, this court, in considering the 14th section of the bankrupt act of 1867, said: (Syllabus)

"Under the fourteenth section of the bankrupt act, which enacts that the register shall convey to the assignee all the estate, real and personal, of the bankrupt, and that such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon by operation of law that the title to all such property and estate shall vest in the said assignee, although the same is then attached on mesne process as the property of the debtor, 'and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings,'—an attachment which under the State laws is a valid lien laid more than four months previously to the proceedings in bankruptcy began, is not dissolved by the transfer to the assignee in bankruptcy: If such assignee do not intervene (which in any such case he may do), and have the attachment dissolved or the case transferred to the Federal court sitting in bankruptcy, but, on the contrary, allow the property to be sold under judgment in the proceedings in attachment, the purchaser, in a case free from fraud, will hold against him."

And the court, proceeding in its opinion in that case, said:

"Where the power of a State court to proceed in a suit is subject to be impeached it can not be done except upon an intervention by the assignee, who shall State the facts and make the proof necessary to terminate such jurisdiction. THIS RULE GOV-

ERNS WHETHER THE FOUR MONTHS' PRINCIPLE IS APPLICABLE OR WHETHER IT IS NOT APPLICABLE."

And this court in the same case quoted approvingly from the case of *Kent vs. Downing*, 44 Ga., 116, to the following effect:

> "The assignee may, on his own motion, be made a party if for no other reason than to have it properly made known to the court that the defendant has become a bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the court in some authentic mode. It may be denied, and the State court cannot take notice of the judgment of other courts by intuition. They must be brought to the notice of the court and this cannot be done without parties."

It will be observed that in the case of *Doe vs. Childers, supra*, this court expressly held that the doctrine announced by it in that case applied whether the attachment had been commenced prior to or within the four-month period.

The doctrine announced by Justice Miller in the case of *Eyster vs. Gaff, supra*, has been followed by the State and Federal courts. Thus, in the case of *In re Irwin Davis*, First Sawyer, 260, the court said:

> "The ordinary tribunals are not deprived by mere force of an adjudication in bank-

> ruptcy of jurisdiction over suits against the bankrupt. The proceedings in such suits may be arrested or controlled by the bankruptcy court when necessary for the purpose of justice. But in the absence of such interference the jurisdiction of the ordinary tribunals remains unimpaired and their judgments are valid."

In the case of *In re Fuller*, First Sawyer, 243, it was said:

> "After the process of the State court has been executed and the property sold thereon, it is too late to interfere. The purchaser at such sale acquires a good title. And this is so even if the judgment is fraudulent provided the purchaser is an innocent one. For this reason, as well as upon general principles, the district court cannot set aside a sale upon the process of a State court, and order the property resold, however apparent it may be that it was sold much below its real value."

The Supreme Court of Minnesota in the case of *Bracket vs. Dayton*, 34 Minn., 219, in applying the principle announced in *Eyster vs. Gaff, supra*, said:

> "An adjudication of bankruptcy under the United States bankrupt law does not of its own force divest other courts of jurisdiction of suits against the bankrupt, or render subsequent proceedings in pending suits void. Such suits might, when necessary, be arrested or controlled by the bank-

> rupt court; but otherwise, the jurisdiction of other courts remains unimpaired and their judgments are valid."

The Supreme Court of New York in the case of *Revere Copper Co. vs. Anthony W. Dimock*, in applying the principle announced in *Eyster vs. Gaff, supra, said* (90 N. Y., 33):

> "Where, after the commencement of an action on contract in a Massachusetts court, and after defendant had appeared and answered therein and had suffered default, but before judgment was rendered defendant was discharged in bankruptcy, *held*, that the discharge was no defense to an action in this State upon the judgment."

In arriving at that conclusion that court announced:

> "The proceedings in bankruptcy did not oust the Massachusetts court of jurisdiction of the action. The action could have been stayed upon the application of the bankrupt; but unless so stayed it could proceed to a valid judgment."

The Federal district court, sitting in Louisiana, in the case of *Muser vs. Kern*, 55 Federal, 916, in applying the doctrine of the case of *Eyster vs. Gaff, supra*, held:

> "Where, after the levy of an attachment in a Federal court, defendants are adjudicated insolvents, and a provisional syndic is appointed, but the attachment suit goes to

> trial on the answer of defendants without any intervention by the syndic until after judgment is rendered sustaining the attachment and for the debt on which it was founded, the right of the attaching creditors to the fund realized from the sale could not be defeated by the syndic, although the same would have been paid to him if he had intervened at the proper time."

The case of *Morning Telegraph Publishing Company vs. S. B. Hutchison Co.*, 8 L. R. A., New Series, is a recent case, decided in the year 1906, and in which the provisions of the present bankruptcy act were considered. The court in that case, in applying the doctrine announced in *Eyster vs. Gaff, supra*, said (page 1232): (Syllabus)

> "Service of process under a petition in bankruptcy does not give the bankruptcy court constructive possession of property formerly belonging to the bankrupt but which at the time of such service is in possession either of a sheriff under attachment from a State court, or of a trustee to whom the bankrupt has conveyed the property for the benefit of creditors so as to prevent the levying upon it of a writ of replevin sued out of the State court."

The remark made by Chief Justice Fuller, in speaking for this court in the case of *Mueller vs. Nugent*, 184 U. S., 1, to the effect:

fected thereby and they are strangers to the proceeding."

Citing—

Jaquith vs. Rowley, 188 U. S., 620-625.
York Mfg. Co. vs. Cassell, 201 U. S., 344-52-53.
Hiscock vs. Varick Bank of New York, 206 U. S., 28.

Counsel for the trustee rely upon the case of *Conner vs. Long,* 104 U. S., 228, as an authority favorable to their contentions. That case, however, is direct authority for what we are contending, and is directly opposed to their contentions. It is true that Justice Matthews in pronouncing the opinion for the Supreme Court in that case, used language to the effect that an assignment in bankruptcy made in one district, so far as its operation is matter of law, operates with the same effect in all districts, and operates upon the title to the property of the bankrupt wherever it is situate, so as to preserve it according to the provisions of the act for distribution under it, and so that a title shall pass as is required without regard to any dealing with it which it forbids, etc.

In that case suit had been commenced against a sheriff because he had sold certain property levied upon by him, and which he afterwards sold under order of the court as perishable property. It was contended that the goods having been levied upon in the attachment proceeding, while there

was pending in another court a bankruptcy proceeding, wherein the former owner of the attached property had been adjudicated a bankrupt, that therefore everything that the sheriff did regarding the matter was void. The court was not called upon to pass upon any facts other than these. By its judgment the sheriff was exonerated, and it was held that the trustee in bankruptcy had no cause of action against him. Among other things this court, in that case, said:

> "In answer to the argument that the bankruptcy proceedings operated to discharge the attachment at once without any order in that behalf, so that the sheriff was left without any authority to hold the property, the opinion proceeds as follows:
>
> " 'It may be true that the attachments
> " ' have ceased to have any binding force,
> " ' but whether they have or not is the ques-
> " ' tion; and this question depends not only
> " ' upon a proposition of law here urged
> " ' upon us, but also upon two questions of
> " ' fact; that is, whether Loeb has been ad-
> " ' judicated a bankrupt and whether he
> " ' was the only member of the firm of Loeb
> " ' & Co. Of the principles of law the State
> " ' court is bound to take judicial notice,
> " ' but of the two facts stated it is not bound
> " ' to take such notice. No court is bound
> " ' to take judicial notice of the proceed-
> " ' ings of another court; if material to the
> " ' controversy before it, it must be in-
> " ' formed thereof by the pleadings and if
> " ' the allegations are denied they must be
> " ' proved by the record. The State court

"'can have no knowledge, or even notice,
"'of the proceedings in the Federal court
"'by which its right to possess and adjudi-
"'cate the property in question is af-
"'fected.'"

II.

SPRINGER'S TITLE TO THE DREDGE IS IN NOWISE DEPENDENT UPON THE VALIDITY OF THE ATTACHMENT PROCEEDINGS, NOR DOES IT IN ANYWISE DEPEND UPON THE QUESTION OF WHETHER OR NOT THE TITLE BECAME VESTED IN THE TRUSTEE IN BANKRUPTCY AS OF THE DATE OF THE FILING OF THE PETITION. HE PURCHASED THE DREDGE AT A SALE ORDERED BY THE NEW MEXICO COURT IN A PROCEEDING IN REM, HAVING FOR ITS PURPOSE THE TRANSMUTATION OF PERISHABLE PROPERTY, OR PROPERTY LIABLE TO BE LOST OR DIMINISHED IN VALUE, INTO IMPERISHABLE MONEY.

Springer was not a purchaser at execution sale, but was a purchaser at a sale directed by the court, *ex necesitate*, in a proceeding authorized and commanded by statute whereby the rights of none of the parties was changed; but whereby the nature and form of the property was simply changed from perishable property to imperishable money to remain in the court's possession and held by it for the rightful owner thereof.

The trustee contends that the title of Springer to the dredge is invalid, because the attachment proceedings under which the dredge was seized by

the court have been dissolved by the proceedings in bankruptcy.

Springer's title is not in any way dependent upon the attachment proceedings for validity. He purchased the dredge at a sale ordered by the court in whose custody and in whose possession the dredge was, and at a sale so ordered because that court had by its judgment found the dredge to be perishable property, or property liable to be lost, or diminished in value.

The judge of the district court was authorized and directed by the provision of sec. 2716, C. L. 1897, to wit:

> "In all suits in the district courts by attachment when the property attached shall be of perishable nature and liable to be lost or diminished in value before the final adjudication of the case and the defendant shall not give bond to retain possession of the same, the plaintiff or defendant may make out a petition in writing setting forth the kind, nature or condition of the property and present said petition to the judge of the district court in vacation and if he shall find it sufficient in form and conditions he may hear the testimony of witnesses as to the property and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property may order such sale to be made and direct the manner thereof,"—

to dispose of the dredge, if in his judgment it was perishable or liable to be lost or diminished in value before the final adjudication of the case.

The acts and things required to be done in the sale of such property as by the above statute contemplated are merely ministerial and not judicial, and the power to do them is not conferred upon the court but upon the judge.

A judicial proceeding is not at all contemplated or provided for by that provision and the judge may take proofs in an informal way, either by taking the oral testimony of witnesses or their written affidavits.

The judge is directed to order the sale whenever he "believes that the interests of both plaintiff and defendant will be promoted by the sale of the property."

The judge in this case, by his order directing the sale of the dredge, necessarily found:

1st. That the dredge was perishable property; or,

2d. That the dredge was liable to be lost or diminished in value before the final adjudication of the case; and,

3d. That he believed the interests of the parties would be promoted by its sale.

He made this finding from evidence in a cause wherein he had jurisdiction of the dredge, and under a statute expressly directing him to make sale when those conditions existed. The object of the statute is the preserving of the attached property, either in the form it was in when seized or converted into money, so that the party eventually entitled to the property might receive it.

In *Young vs. Kellar,* 94 Missouri, 581, the Supreme Court of Missouri, construing the Missouri statute, which directed the sale of perishable property under circumstances similar to the case at bar, and determining the effect of a sale of perishable property ordered by a court, said:

> "But an obstacle more difficult, if possible, to surmount, encounters the plaintiff in the doctrine announced in the 9th and 12th instructions asked by the defendant, but refused. Our statute makes provisions for the sale of property when it has been attached and 'is likely to perish or depreciate in value before the probable termination of the suit, or the keeping of which would be attended with much loss or expense.' In such cases the court or judge in vacation orders the sale: * * * this was the course pursued in the present instance, and the question presented is whether the title of the defendant is absolute and good against all the world. Instances where things of a perishable nature, etc., are sold and the proceeds of the sale preserved to answer instead of those sold, are not infrequent in our statutes. * * * Likewise boats, rafts, etc., may be sold and the proceeds paid into the county treasury. A similar course is pursued in regard to strays: Revised Statutes, section 356. Doubtless there are other instances where a sale of property is authorized by law. Such sales of perishable property *pendente lite* are very unusual in their origin and they proceed on the principle of necessity. Baker *vs.* Baker, First Vent., 313. Courts of chancery exercise

such a power of sale where property is expensive to keep or is perishable. Rorer, Judicial Sales, section 526. And even in the absence of statutory regulation it has been ruled that where an officer levies an attachment upon perishable property, that it is his duty as the custodian of that property not to permit it to become worthless by natural decay, and thus defeat the very object of the attachment, but to sell the same and account only for the net proceeds. And this ruling was made in analogy to such sales in admiralty and upon the obvious reasonableness of such a rule. Speaking of such sales in admiralty, after appeal taken, Marshall, Chief Justice, said: 'A right to order sale is for the benefit of all parties, not because the case is pending in that particular court, but because the thing may perish while in its custody and while neither party can enjoy its use. The property does not follow the appeal into the superior court. It still remains in custody of the officer of that court in which it was libelled. The cause of its preservation is not altered by the appeal. The duty to preserve it is still the same, and it would seem reasonable that the power consequent on that duty would be also retained. On the principles of reason, therefore, the court is satisfied that the tribunal whose officer retains possession of the thing retains the power of selling it when in a perishing condition, although the cause may be carried by appeal to a superior court.' This opinion is not unsupported by authority. In his chapter on the powers of the instance court, at page 405, Browne says: 'If the ship or goods are in a state of decay, or

of a perishable nature, the court is used during the pendency of a suit, or sometimes after sentence, notwithstanding an appeal, to issue a commission of appraisement and sale, the money to be lodged with the register of the court *in usum jus habentes*. This practice does not appear to be established by statute, but to be instant to the jurisdiction of the court and to grow out of the principles which form its law. A prize court not regulated by particular statute would proceed on the same principles; at least there is the same reason for it. Jennings *vs.* Carson, 4 Cranch, 26.' In Foster *vs.* Cockburn, Parker's Report, 70, where perishable property has been seized on a claim of the plaintiff, Parker, J., said: 'But I will show from the reason of several authorities which have not been mentioned, that a discretionary power is necessarily inherent in the court in all cases of this nature, for the benefit of the parties interested in the event of them.' Eyston & Studd. Plowd. Com., 465, 466. Wreck, by 11 Westm., ch. 4, is to be kept by the view of the sheriff, coroner, etc., for a year and a day, and if they do otherwise they are to be awarded to prison; 'yet if there are perishable goods the sheriff may, according to the sense of the act, sell within the year, even contrary to the expressed letter of it.' * * * 'In Megee *vs.* Beirne, 39 P. St., 50, where cattle belonging to one person had been seized under attachment as the property of another person, sold on mesne process as perishable property, and the real owner brought trespass against the sheriff, it was held that he could maintain the action; that the proceeding by attachment was

not a proceeding *in rem* and did not bind the plaintiff but THAT THE PROCEEDING WHICH RESULTED IN THE SALE OF THE PROPERTY PENDENTE LITE WAS A PROCEEDING IN REM WHICH CONFERRED A VALID TITLE ON THE PURCHASER THOUGH THE SHERIFF COULD NOT SHELTER HIMSELF BEHIND THE VALID TITLE THEN ACQUIRED. And a distinction is there clearly drawn between the effect of a sale of the latter description where the property itself is merely changed in form and one where, after judgment rendered, a *fi. fa.* issue to sell the defendant's interest in such property.' A similar distinction is taken in Griffith *vs.* Fowler, 18 Vt., 390, between a sale under execution and a sale of goods lost or estrays, under statutory provisions, the latter method of procedure being held a proceeding *in rem* and transferring the absolute title.

"The authorities on this subject are very fully collected in 2 Smith's Leading Cases, 973 *et seq.* It is there said: 'It should, however, be remembered that where a court of competent jurisdiction assumes the control or custody of a particular thing the act verges on the nature of proceedings *in rem* and should be so interpreted if requisite for the protection either of the property itself or of the parties to the proceeding. THUS AN ORDER FOR THE SALE OF GOODS WHICH HAVE BEEN SEIZED UNDER AN ATTACHMENT AS PERISHABLE GOODS WILL PASS A GOOD TITLE TO THE PURCHASER NOTWITHSTANDING ANY DEFECT THAT MAY EXIST IN THAT OF THE GARNISHEE OR DEFENDANT. AND IT IS WELL SETTLED IN GENERAL THAT A SALE CONDUCTED BY NECESSITY WILL CONFER A GOOD TITLE ON THE PURCHASER ALTHOUGH THE VENDOR HAS NONE

BECAUSE THE TRUE OWNER IS OF ALL MEN THE MOST INTERESTED IN HAVING THE PROPERTY TURNED INTO MONEY IF IT CANNOT BE PRESERVED.' * * * Another author touching the same subject, says: 'The property being in *custodia legis* to abide the event of the suit without change of ownership, the application for the order of sale is a duty owing to the defendant, and the order is made to protect property from diminution or deterioration. Although the purchaser takes a perfect title to the perishable article the title of the defendant immediately attaches to the money realized at the sale, still, however, subject to the lien. Thus the title to the property remains unchanged until the judgment is duly executed. * * * This transmutation of perishable property into imperishable money, in consequence of an order of sale, has been recognized by this court on two occasions.'

"As the result of these authorities, and indeed upon the bare reason of the thing, I am abundantly satisfied that the question propounded as to the validity of the defendant's title must be answered in the affirmative. To hold otherwise would be to deny the intended and legitimate effect of such sales and render them, instead of a benefit and truly conservative measure, something of the very opposite end; a mere futile formula conferring no benefit and preventing no sacrifice. *Ex gr.* take the case of a carload of bananas levied upon by virtue of a writ of attachment. The order of sale is imperatively demanded, but if no valid title can be obtained who would buy except at such a ruinous sacrifice as to defeat the very

> object of the attachment. * * * The correct way to state the matter here at issue is this: That where A's property, of a perishable nature, is improvidently attached as the property of B, the court, acting as a prudent and careful custodian of that property, will make such order in the premises as will, so far as possible, prevent A's interests from being sacrificed."

In *Betterton et al. vs. Eppstein et al.*, the Supreme Court of Texas, 14 S. W., 861, considered this same question, and in a well-reasoned opinion, in which the judgment of the lower court was reversed, reached the same conclusion as is reached by the Missouri court. In that case there was a contest between the holder of a landlord's lien and a purchaser of perishable property, directed to be sold by the order of the judge having the property in the possession of the court which held the same under attachment.

The Texas court, while conceding that if the property had been sold under final process, and under a judgment rendered in the attachment proceeding, that the landlord's lien would have been superior to the lien acquired by the purchaser of the property at the judgment sale of the things attached, yet held that the purchaser of the same property acquired at a sale of the property which was made because the property was perishable, took an absolute title, free from the lien of the landlord. In reaching this conclusion the Supreme Court of Texas, said:

"If the property had been sold under final process, after judgments in the attachment suits for the purpose of satisfying them, there is no doubt the sales would have been subject to the liens of any persons superior and prior to the liens acquired by attachment. It is not believed, however, that the same rule applies when personal property perishable in its nature, is sold pending litigation, under order of court or of a judge having power under a statute to make such an order, for such sales are made under the conservation of the rights or interests of every person owning or having claim upon the property, which might be lost pending litigation, from natural decay, waste or deterioration in value. By the seizure under the attachment, the custody of the property became that of the State, or, as it is sometimes expressed, the custody of the law, and as a legal custodian it had the power to do whatever was necessary to preserve the property which in law is the value of the thing, even though to do so it became necessary to change it from goods to money. A recent writer has well said that the sale of perishable property, by order of the court, before any condemnation of it, or before any merging of an attachment lien into a judgment lien may be made without publication notice to an absent defendant. Such a sale always rests upon necessity for its justification. * * * Admitting the necessity, in any case, the want of notice to the owner would not render invalid the title acquired by the purchaser at the sale. * * * It is not an exceptional judgment divesting the owner of his rights for he owns the proceeds after

> the perishable property has been converted into cash. The thing would have perished had it not been sold. The purchaser has obtained the title the former owner had, but not by virtue of an attachment judgment against the property. * * * The court's right to sell is for the preservation of the property by changing it from its perishable condition to money, which remains in custody as its substitute. There is no hearing and determining the question of the validity of the plaintiff's claim, nor of the liability of the property attached. There is no exercise of jurisdiction in the sense in which jurisdiction is exercised when there is final judgment in the case."

The object of the statutes providing for the sale of attached property *in limine* or before final judgment, is not to alter the rights of the parties but simply to change the form of the property from perishable or property expensive to keep, to imperishable property, so that when the litigation is terminated the rightful owner will have the fruits of the controversy.

If, as contended by appellants, the title to the attached property became vested in the trustee of the bankrupt because of the bankruptcy proceedings, a proposition which we deny, still that fact would not affect Springer's title to the dredge. The sale of the dredge has not in anywise affected the rights of the parties, either of the trustee or of the attaching creditors. If the dredge had been the property of a third person a stranger to the

action, the sale having been in a proceeding *in rem,* the purchaser would have taken a good title to the dredge. The intervener, the trustee in bankruptcy, certainly could not have rights superior to those of a purchaser from the bankrupt *pendente lite.*

The proceeds of the sale simply takes the place of the attached property and does not interfere with prior liens.

State vs. Judge, 44 La. Ann., 87.
Pollard vs. Baker, 101 Mass., 259.
Taylor vs. Thurman, 12 S. W. Rep., 614.
Welsh vs. Lewis, 81 Ga., 387.

The object of the statute permitting sale of property expensive to keep or perishable, before judgment, is for the benefit of both parties or any third party who claims it.

Pollard vs. Baker, 101 Mass., 259.
Peters vs. Aehle, 31 Mo., 380.
York vs. Sanborn, 47 N. H., 403.

The correctness of an order for the sale of the attached property before judgment, or the determining the propriety of such sale, will not be reviewed, nothing appearing affirmatively impeaching it, but the propriety thereof will be presumed.

McCreery vs. Barney Nat'l Bnk., 116 Ala., 224.
Runner vs. Scott, 150 Ind., 441.
Dunn vs. Salter, 1 Dno. Ky., 342.

Indeed, the bankruptcy courts have given recognition to this principle in construing that provision of the bankruptcy act which provides for the sale of perishable property of the bankrupt prior to the adjudication. In the case of *In re Le Vay,* 125 Federal Rep., 990, the Federal District Court of the Middle District of Pennsylvania, in a case wherein exempt property of the bankrupt had been sold as perishable, held that the bankrupt became entitled to the proceeds of sale although the trustee in bankruptcy could never have obtained title to the perishable goods, the court in its opinion saying:

> "The sale of goods as perishable is for the benefit of all concerned, the money realized therefrom standing instead of the property itself, against which the parties interested may assert their rights the same as if the sale had not taken place."

Counsel for trustee have discussed this case and discussed the order which directed the sale of the dredge as if it was made by the court on the ground that the dredge was perishable property, and that no other considerations moved the court in making the sale other than the fact that the dredge is perishable. Counsel have adopted a peculiarly narrow view of both the statute which directs the sale of property circumstanced as the dredge was, and also of the order directing the sale.

Section 2716, as before remarked, was transported from the State of Missouri. It seems to be a part of the act of February 6, 1855. The letter of the statute is, "When the property attached shall be of a perishable nature and liable to be lost or diminished in value before the final adjudication of the case." They would have the court read this statute to the effect that the direction to sell was only commanded by the law when the property was both of a perishable nature and at the same time liable to be lost or diminished in value before the final adjudication of the case. To so construe or read this statute is erroneous. The modifying clauses of the word "property" are independent; and the expression of the legislature is that property, either when it is perishable or when it is liable to be lost or diminished in value, before the final adjudication of the case, that then the law operates upon such property and directs its sale. If property is of a perishable nature it should then be sold, without reference to whether it is liable to be lost or diminished in value. On the other hand, if attached property is liable to be lost or diminished in value before the final adjudication of the case, then it should also be sold, regardless of the question whether such property is perishable or not.

It is a familiar rule of construction that the words "and" and "or" should be substituted one for the other in construing statutes whenever the context requires this to be done. The meaning of

the context in this case is self-evident, and it is manifest that attached property is by the statute directed to be sold whenever it is circumstanced in either of the conditions mentioned by the statute. The rule is laid down in *Sutherland on Statutory Construction*, sec. 252, to the following effect:

> "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one is read in place of the other in deference to the meaning of the context."

And even the word "perishable" is much more elastic than opposing counsel conceive it to be. It does not mean simply property liable to decay. For example: It is held that the term "perishable" should receive a liberal rather than a narrow construction and will embrace property the keeping of which may render it of no value in the end to satisfy the claims, and in this sense almost any property subject to attachment may be sold as perishable.

McCreery vs. Berney National Bank, 116 Ala.. 224.

Young vs. Davis, 30 Ala., 113.

Schumann vs. Davis, 13 N. T. Supplement, 575.

Southern Railroad Co. vs. Sheppard, 20 S. E., 481.

Anonymous vs. Horse and Chaise, 18 N. J. Law, 26.

Mosher vs. Bay Circuit Judge, 108 Mich., 579.

In the case at bar the judge was directed to order the sale of the property if either alternative existed. If he found that the dredge was perishable, it was his duty to order the sale of the dredge; or if, on the other hand, he found that it was expensive to keep, or likely to diminish in value, or liable to be lost before the final adjudication of the case.

In this case the judge who ordered the sale of the dredge was apprised, by evidence, of its location in a mountain stream, where it was moored in a lake which was a portion of that mountain stream. The court takes judicial notice of the fact that these mountain streams are at certain seasons of the year so swollen by torrential rains as to assume the proportion of raging rivers, and the danger of the loss of the dredge by being washed away, instead of being trifling, was imminent. That the dredge was expensive to keep and likely to diminish in value or was liable to be lost before the final adjudication of the case is apparent from the reading of the testimony of Charles Springer contained in paragraph 10 of the stipulation entered

into between Springer and the trustee in bankruptcy. (See R., 72.)

The appellant contends that the price paid for the dredge by Springer was inadequate. He paid the sum of five thousand dollars therefor and testified that this was a fair and adequate price for the property at the date of sale. This testimony was given at a hearing before the court whereby the trustee sought to have the judge of the district court of Colfax county set aside his prior order ordering the sale of the dredge and the order approving the sale thereof. The trustee in bankruptcy, by his intervening petition, alleged,

> "That the said dredge was worth upwards of the sum of ten thousand dollars and that the price at which said dredge is claimed to have been sold is grossly inadequate."

The judge of the district court heard evidence upon the intervening petition and the answer of Springer thereto, but the trustee in bankruptcy introduced no evidence contradicting the witness Springer as to the value of the dredge at the time he purchased it. It is manifest that had there been any such inadequacy of price paid for the dredge at the sale, by Springer, as appellants claim, they would have been able to produce some witness who could have contradicted Mr. Springer on that point. By their intervening petition they asserted the dredge to be of the value of "upwards

of ten thousand dollars," still they did not bring forward a single witness to prove that assertion.

III.

SPRINGER IS A BONA FIDE PURCHASER FOR VALUE OF THE DREDGE, AND HIS TITLE IS RECOGNIZED AND PROTECTED BY THE VERY PROVISIONS OF THE BANKRUPTCY ACT WHICH OPPOSING COUNSEL CONTEND HAVE DESTROYED OR PREVENTED THE ACQUISITION BY HIM OF HIS TITLE.

The Supreme Court of New Mexico by its 9th, 12th, and 13th findings of fact found as follows:

> "9. That five thousand dollars was a fair and adequate price for the dredge and equipment aforesaid, at the time of said sale in its then condition and situation."
>
> "12. That Charles Springer, prior to the time he purchased the dredge and equipment aforesaid, had no knowledge nor notice of any kind that proceedings of any nature, or character whatsoever had been commenced in the District Court of the United States for the Northern District of Illinois, the purpose of which was to cause the defendant company to be adjudicated a bankrupt, and had no knowledge or information of the filing or pendency of any of the bankruptcy proceedings hereinbefore referred to, until two weeks after the time of his purchase at the sale aforesaid, and that the said Charles Springer had no knowledge or notice at the time of his said

purchase at the sale aforesaid that the defendant company was insolvent."

"13. That said Charles Springer was a *bona fide* purchaser of said mining dredge and equipment for value, and acquired the same without notice or reasonable cause for inquiry as to whether or not there had been commenced proceedings in bankruptcy against said defendant company."

The trustee in bankruptcy relies on section 67 of the Federal bankruptcy act as authority for the proposition that the proceedings had in the district court of Colfax county whereby the dredge was sold, became and are null and void and of no effect because the Oro Dredging Company had been adjudicated a bankrupt while the proceedings in the district court of Colfax county were pending. Section 67 F, is to the following effect:

"That all levies, judgments, attachments * * * obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy * * * attachment shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt; * * * PROVIDED, THAT NOTHING HEREIN CONTAINED SHALL HAVE THE EFFECT TO DESTROY OR IMPAIR THE TITLE OBTAINED BY SUCH LEVY, JUDGMENT, ATTACHMENT OR OTHER LIEN OF A BONA FIDE PUR-

CHASER FOR VALUE WHO SHALL HAVE ACQUIRED THE SAME WITHOUT NOTICE OR REASONABLE CAUSE FOR INQUIRY."

The proviso just quoted is a recognition in the bankruptcy act itself of the title obtained by *bona fide* purchasers for value. The evidence in this case shows that Springer paid the sum of five thousand dollars for this property. That qualifies him as a purchaser for value, and the evidence still further shows that it was a fair price for the property, and the court so found. The dredge is in the nature of junk. The corporation which was operating it had become insolvent, and it is to be presumed that it became insolvent by reason of the lean character of the land that it was dredging for gold. To again use this machinery it would be necessary to dismantle the boat and carry it to other ground. Considering all the circumstances concerning the property sold as perishable, or sold because it was expensive to keep, proves abundantly that Springer paid a fair and ample price for the dredge.

The record in this case shows that the property before sale was duly advertised in a newspaper; that there were other bidders for the property besides Mr. Springer. The trustee in bankruptcy, in his intervening petition, asserts that the dredge at the time of sale was worth upwards of ten thousand dollars, but this assertain is characteristic of extravagant statements made by

pleaders and it is significant that no witness was produced upon the hearing in the cause when the intervener sought to set aside the sale for inadequacy of price, who would testify that five thousand dollars was not an adequate price for the dredge; but all speculation upon the adequacy of the price paid by Springer for the dredge and the necessity of the sale of the dredge are concluded by the court's findings in the case.

This court, in *Clark vs. Larremore*, 188 U. S., 486, has construed the proviso at the end of section 67F of the bankruptcy act. In an opinion rendered by Justice Brewer this court said:

> "The contention of the petitioner is that 'The sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution and not of the bankrupt at the time of the adjudication, and the trustee, therefore, has no title to the same.'
>
> "This contention cannot be sustained. The judgment in favor of petitioner against Kenney was not like that in Metcalf *vs.* Barker, 187 U. S., 163, one giving effect to a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien; and as judgment, execution and levy were all within four months prior to the filing of the petition in bankruptcy the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment, and effect that and all subsequent proceedings.

> The language of the statute is not 'when' but IN CASE HE IS ADJUDGED A BANKRUPT, and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception. Further, the statute provides that 'the property affected by,' not the property subject to, the lien is wholly discharged and released therefrom. It is true that the stock and fixtures, the property originally belonging to the bankrupt, has been sold, but having, so far as the record shows, passed to a '*bona fide* purchaser, for value,' it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings. But the money received by the sheriff took the place of that property."

This case is, we submit, conclusive upon all questions raised by the trustee. In the cited case action was commenced in the State court on January 23, 1899, judgment was rendered on March 6, 1899, the sheriff's sale was had on March 15, 1899, the adjudication in bankruptcy took place April 13, 1899; so it will be seen that all the proceedings in this case were had in the State court within the period of four months prior to an adjudication in bankruptcy. And, notwithstanding that the proceedings were so had within the four-months' period, the court, in giving effect to the proviso at the end of section 67F, expressly held that the property sold by the sheriff remained the property of the *bona fide* purchaser for value, but

that the money received by the sheriff took the place of the property. To the same effect is the case of *In re Franks,* 95 Federal, 635. The Federal district court in that case said:

> "Where a petition in bankruptcy is filed against an insolvent debtor within four months after the levy of an attachment on his property, and he is adjudged bankrupt, and the attachment is thereby dissolved, but in the meantime the sheriff under the attachment has sold the property to a *bona fide* purchaser, for value, and collected the proceeds, such proceeds constitute a part of the estate in bankruptcy and must be recovered by the trustee when appointed."

And—

> "A court of bankruptcy has no jurisdiction on a summary petition by a trustee in bankruptcy to order a sheriff to pay over to such trustee money remaining in his hands as the proceeds of a sale on attachment against the bankrupt made prior to the filing of the petition in bankruptcy, although the attachments being levied within four months before the institution of the bankruptcy proceedings, was dissolved by the adjudication therein. The trustee should apply for such an order to the State court from which the attachment issued, and if refused his remedy is to sue the sheriff for money had and received."

In reaching the conclusion just quoted that court said:

"Under the provisions of the bankruptcy law all * * * attachments * * * obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt; and the property affected by the attachment * * * shall be deemed wholly discharged and released from the same and shall pass to the trustee * * * but this provision shall not have the effect to destroy or impair the title obtained by such levy and attachment, or other LIEN OF A BONA FIDE PURCHASER, FOR VALUE, who shall have acquired the same without notice or reasonable cause for inquiry. The Bankruptcy Act of 1898, section 67.

"The attachment mentioned in this petition was levied within four months prior to the filing of the petition in bankruptcy, and to the time said Franks was adjudged a bankrupt. The levy of the attachment, therefore, became null and void, and the property affected by it was wholly discharged and released, and passed to the trustee, the petitioner herein. THE PROPERTY, HOWEVER, HAS PASSED INTO THE HANDS OF A THIRD PERSON UNDER THE SALE BY THE SHERIFF, AND IT MAY BE ASSUMED THAT SUCH PERSON IS A BONA FIDE PURCHASER, FOR VALUE, AND THAT THE TRUSTEE CANNOT FOR THAT REASON RECOVER AND RECLAIM IT FROM HIM."

This provision of the bankruptcy act was enacted by Congress in contemplation of just such cases as the one at bar. Section 67, paragraph F, manifestly applies only to attachment levies which

were initiated within four months from the date that the debtor was adjudicated a bankrupt. Congress, then, by this provision, provided that all such attachments should be dissolved, but that *bona fide* purchasers who had succeeded to the title of the property would be protected. No other view can be taken of this provision. If the view expressed by opposing counsel is correct, there never could be a *bona fide* purchaser of property attached within four months of the date of the adjudication in bankruptcy.

The contention of appellant is that because the sale to Springer was made subsequent to the adjudication of bankruptcy he is not a *bona fide* purchaser, and that there can be no *bona fide* purchaser after an adjudication, because the fact of the adjudication is constructive notice to all persons, wherever situate.

The bankruptcy act does not by any of its provisions make the fact of adjudication constructive notice.

The bankruptcy act manifestly recognized by its proviso, *supra,* the rights of a *bona fide* purchaser for value just as they were recognized at common law, and did not intend to define a *bona fide* purchaser for value differently than the common law defined him to be.

A *bona fide* purchaser at common law was defined thus:

> "A *bona fide* purchaser is one who buys property without notice that some third

party has a right to or interest in such property, and pays a full and fair price for the same at the time of such purchase, or before he has notice of the claim or interest of such other in the property."

Spicer vs. Waters, 65 Barb., 227.
Perry on Trusts, page 218.
Alden vs. Trubee, 44 Conn., 455.

Respectfully submitted,

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JONES, TRUSTEE IN BANKRUPTCY OF ORO DREDGING COMPANY, *v.* SPRINGER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 23. Argued October 30, November 4, 1912.—Decided December 2, 1912.

A *bona fide* purchaser for value of perishable property held under attachment at a sale made by order of the local court gets a good title notwithstanding bankruptcy proceedings had been instituted within four months after the attachment and had proceeded to adjudication before the sale.

An order to sell attached property on the ground that it is perishable is not one to enforce the lien of the attachment but one incidental to the preservation of the property, and the court having the custody has the jurisdiction to sell.

A proceeding to sell perishable property is one *in rem* and the purchaser gets title against all the world.

A local court having the custody under attachment of perishable goods may order a sale if necessary to protect and it is not necessary that such sale be made under General Order XVIII, 3, in order to validate it.

An order for sale of perishable property held under attachment, made by the local court within the terms of the local act, will not be set aside by this court.

Even if the local statute permitting sales of perishable property held in *custodia legis* be broader than General Order XVIII, 3, this court will not for that reason only set aside a sale made by the local court if within the terms of the local act.

As to whether property is perishable or not, this court will follow the rulings of a territorial court in the absence of a strong reason to the contrary.

15 N. Mex. 98, affirmed.

THE facts are stated in the opinion.

Mr. Elmer E. Studley and *Mr. J. E. MacLeish,* with whom *Mr. Frank H. Scott* and *Mr. Edgar A. Bancroft* were on the brief, for appellant:

After the petition in bankruptcy was filed the assets of the bankrupt were in *custodia legis,* and the jurisdiction of the bankruptcy court to sell the same was exclusive. The sale to Springer was had subsequent to the order of adjudication in bankruptcy, and he was charged with notice of the pendency of the bankruptcy proceedings and could obtain no title superior to that of the trustee.

No title passed to the purchaser of the dredge, because the proceedings to sell and the sale were had subsequent to the entry of the order of adjudication in the bankruptcy proceedings. The proviso to § 67f protecting the title of an innocent purchaser for value, is no protection to

appellee, as the same does not apply to the sale made in this case, nor does it under any circumstances contemplate a purchase subsequent to an adjudication in bankruptcy. Bankruptcy Act of 1898, §§ 67f, 70; *Conner* v. *Long*, 104 U. S. 228, 231; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; *Bank* v. *Sherman*, 101 U. S. 403, 406; *Mueller* v. *Nugent*, 184 U. S. 1, 14; *Lamp Chimney Co.* v. *Ansonia Brass Co.*, 91 U. S. 656, 661; *In re Granite City Band*, 137 Fed. Rep. 818; *State Bank* v. *Cox*, 134 Fed. Rep. 91; *Clarke* v. *Larremore*, 188 U. S. 486.

The sale in this case was not had in a proceeding to enforce a preëxisting lien, and the adjudication of the territorial court ended, although not appearing upon its own record, when the adjudication was entered in the bankruptcy proceedings. *Conner* v. *Long*, 104 U. S. 228, 239, 240; *In re Watts & Sacks*, 190 U. S. 1, 27; *Eyster* v. *Gaff*, 91 U. S. 521; *Doe* v. *Childers*, 21 Wall. 642.

Subsequent to adjudication, perishable property, like all other property of the bankrupt, must be sold in the bankruptcy court. Cases *supra*, and see General Order in Bankruptcy, XVIII.

Assuming the jurisdiction of the territorial court to sell perishable property was concurrent with that of the bankruptcy court the sale was improper.

The dredge was not perishable property within the meaning of those words as contemplated by the sale of perishable property in bankruptcy proceedings, in that the dredge was in the custody of the bankruptcy court and could have been conserved, and the same was not destroyed, or expensive to keep, in the sense that it ought to have been sold. *Bryan* v. *Bernheimer*, 181 U. S. 188; General Order in Bankruptcy, XVIII.

The dredge was not perishable property within the meaning of the statute of the Territory of New Mexico relating to sales of property of a perishable nature and liable to be lost before final adjudication.

The proceedings to sell the dredge were irregular and unwarranted, and not such as were contemplated by the statute, in that final adjudication in the attachment proceedings, upon the record in that cause, could have been had on the same day that the application was made and granted to sell the dredge, and no petition was filed setting out the kind, nature and condition of the property, as required by statute. *Mosher* v. *Bay Circuit Judge*, 108 Michigan, 579; *Oneida National Bank* v. *Paldey*, 2 Mich. N. P. 221; *Newman* v. *Cain*, 9 Nevada, 234; *Goodman* v. *Moss*, 64 Mississippi, 303; *Weis* v. *Basket*, 71 Mississippi, 771; Comp. Laws New Mex., 1897, § 2716, and see also § 2685, Art. VIII, Sub-sec. 103–106.

The sale of the dredge was not confirmed before the purchaser had actual knowledge of the bankruptcy proceedings.

No order confirming said sale to appellee was entered prior to the appearance of the trustee in bankruptcy in said cause, and although the court found that the sale was confirmed on July 17, such finding is not supported by the record. The court also found that the purchaser knew of the bankruptcy proceedings on June 26, two weeks after his purchase.

Mr. Ernest Knaebel, with whom *Mr. Charles A. Speiss*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for appellee:

The appellee purchased the dredge at a sale ordered by the judge of the District Court of Colfax County in the rightful exercise of conceded jurisdiction without knowledge on the part of the court or of appellee of the pendency of the bankruptcy proceedings in Illinois. Appellee, therefore, obtained a perfect title to the dredge. *Eyster* v. *Gaff*, 91 U. S. 521; *Doe* v. *Childers*, 21 Wall. 642; *Kent* v. *Downing*, 44 Georgia, 116; *In re Irwin Davis*, 1 Sawyer, 260; *In re Fuller*, 1 Sawyer, 243; *Bracket* v. *Dayton*, 34

Minnesota, 219; *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33; *Muser* v. *Kern*, 55 Fed. Rep. 916; *Morning Telegraph Co.* v. *Hutchinson Co.*, 8 L. R. A. (N. S.) 1232; *Mueller* v. *Nugent*, 184 U. S. 1; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, 352, reversing 135 Fed. Rep. 52; *In re Rathman*, 183 Fed. Rep. 913, 924; *Jaquith* v. *Rowley*, 188 U. S. 620, 625; *Hiscock* v. *Varick Bank*, 206 U. S. 28. *Conner* v. *Long*, 104 U. S. 228, is not favorable to the appellants, but is directly opposed to their contentions.

Appellee's title to the dredge is in nowise dependent upon the validity of the attachment proceedings, nor does it in anywise depend upon the question of whether or not the title became vested in the trustee in bankruptcy as of the date of the filing of the petition. He purchased the dredge at a sale ordered by the New Mexico court in a proceeding *in rem*, having for its purpose the transmutation of perishable property, or property liable to be lost or diminished in value, into imperishable money. *Young* v. *Kellar*, 94 Missouri, 581; *Betterton* v. *Eppstein*, 14 S. W. Rep. 861. The proceeds of the sale simply took the place of the attached property without interfering with prior liens. *State* v. *Judge*, 44 La. Ann. 87; *Pollard* v. *Baker*, 101 Massachusetts, 259; *Taylor* v. *Thurman*, 12 S. W. Rep. 614; *Welsh* v. *Lewis*, 81 Georgia, 387.

The object of the statute permitting sale of property expensive to keep or perishable, before judgment, is for the benefit of both parties or any third party who claims it. *Pollard* v. *Baker*, 101 Massachusetts, 259; *Peters* v. *Aehle*, 31 Missouri, 380; *York* v. *Sanborn*, 47 N. H. 403.

The correctness of an order for the sale of the attached property before judgment, or determining the propriety of such sale will not be reviewed, nothing appearing affirmatively impeaching it, but the propriety thereof will be presumed. *McCreery* v. *Barney Nat'l Bank*, 116 Alabama, 224; *Runner* v. *Scott*, 150 Indiana, 441; *Dunn* v. *Salter*, 1 Dno. Ky. 342; *In re Le Vay*, 125 Fed. Rep. 990.

The word "perishable" is very elastic. It does not mean simply property liable to decay. It should receive a liberal rather than a narrow construction and embraces property the keeping of which may render it of no value in the end to satisfy the claims, and in this sense almost any property subject to attachment may be sold as perishable. *McCreery* v. *Barney National Bank*, 116 Alabama, 224; *Young* v. *Davis*, 30 Alabama, 113; *Schumann* v. *Davis*, 13 N. Y. Supp. 575; *Southern Railroad Co.* v. *Sheppard*, 20 S. E. Rep. 481; *Anonymous* v. *Horse and Chaise*, 18 N. J. Law, 26; *Mosher* v. *Bay Circuit Judge*, 108 Michigan, 579.

Appellee is a *bona fide* purchaser for value of the dredge, and his title is recognized and protected by the very provisions of the Bankruptcy Act which opposing counsel contend have destroyed or prevented the acquisition by him of his title. *Clark* v. *Larremore*, 188 U. S. 486; *In re Franks*, 95 Fed. Rep. 635.

The Bankruptcy Act does not by any of its provisions make the fact of adjudication constructive notice. As to who is a *bona fide* purchaser at common law, see *Spicer* v. *Waters*, 65 Barb. 227; Perry on Trusts, 218; *Alden* v. *Trubee*, 44 Connecticut, 455.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here upon appeal from a judgment denying the title of the appellant as trustee in bankruptcy to property formerly belonging to the bankrupt and sold in this suit by order of the local court. The facts are these. The property in question is a mining dredge. It was attached on February 27, 1906, and a receiver was appointed on March 19. On May 1, a petition was filed for an order directing the dredge to be sold on the ground that it was 'of a perishable nature, and liable to be lost or diminished in value before the final adjudication of the

case,' within the Compiled Laws of New Mexico, 1897, § 2716, and an order to that effect was made on the same day. The ground of the finding on which the sale was ordered was that the dredge was anchored in an embanked pond fed by a mountain stream subject to heavy floods, and was liable to damage from that source. The sale took place on June 26, and the dredge was bought in good faith and without notice of the defendant's insolvency, at a price of five thousand dollars paid into court, by the appellee, Springer. The sale was confirmed on July 17. But on March 12, 1906, a petition in bankruptcy had been filed in the Northern District of Illinois against the Oro Dredging Company, the defendant in this suit. On April 23, the company was adjudged a bankrupt. On July 9, the appellant was appointed trustee and on July 19 qualified. On August 2, he first appeared in this cause, that being the first notice of the adjudication received by the parties concerned or the court. He filed an intervening petition praying that the order of sale be set aside, the attachment dissolved and the property turned over to him. The petition so far as it affects the dredge was denied, the judgment was affirmed by the Supreme Court of the Territory and the trustee appealed.

The main ground of the appeal is that by § 70 of the Bankruptcy Act the title of the trustee related back to the date of the adjudication of bankruptcy, and that, as matter of law, Springer could not be a *bona fide* purchaser within the proviso of § 67f saving the title of a *bona fide* purchaser for value who shall have acquired the property by the attachment without notice or reasonable cause for inquiry. It is argued that filing the petition in bankruptcy was a caveat to all the world, *Mueller* v. *Nugent*, 184 U. S. 1, 14, and that the above proviso can have effect only when the judgment and sale took place before the petition was filed.

We have no occasion to consider the last proposition in order to decide this case, or what effect, if any, the pro-

viso has upon some language in *Conner* v. *Long*, 104 U. S. 228, relied upon by the appellant (see *Clarke* v. *Larremore*, 188 U. S. 486, 488), the proceeding not having been one to enforce the lien of the attachment but simply an order made on a finding that, in the language of the New Mexico statute, 'the interests of both plaintiff and defendant will be promoted by the sale of the property.' But the proposition quoted from *Mueller* v. *Nugent* must be taken with reference to the facts then before the court and not as applicable to all intents and purposes. *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344, 353. *Hiscock* v. *Varick Bank*, 206 U. S. 28, 41. *In re Rathman*, 183 Fed. Rep. 913, 924, 925. It is true that the estate is regarded as *in custodia legis* from the date of the petition as against a subsequent attachment. *Acme Harvester Co.* v. *Beckman Lumber Co.*, 222 U. S. 300, 306, 307. But in a case like the present where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and jurisdiction of the local court were ended before notice of the bankruptcy proceedings. *Eyster* v. *Gaff*, 91 U. S. 521, 524, 525. *Scott* v. *Ellery*, 142 U. S. 381, 384. *Jaquith* v. *Rowley* 188 U. S. 620, 626. *Frank* v. *Vollkommer*, 205 U. S. 521, 529. *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33.

The jurisdiction of the territorial court not having been avoided and that court having the actual custody of the *res*, it had the power to preserve the subject-matter of the controversy that necessarily is incident to such conditions. An illustration although not a perfect analogy is to be found in *United States* v. *Shipp*, 203 U. S. 563, 573. An appeal had been taken to this court on a petition for *habeas corpus*, where a prisoner was held under sentence of a state court, and pending the appeal this court had ordered the custody of the appellant to be retained. Shipp was charged with contempt for having been party

to a conspiracy that ended in lynching the prisoner. It was strongly argued that neither the Circuit Court that refused the writ nor this court had any jurisdiction of the case, but it was held that, whether it had jurisdiction or not, until the question was decided this court had authority from the necessity of the case to preserve the subject of the petition. A similar authority existed in the territorial court until the trustee saw fit to intervene, which, so far as would have appeared at the time of the sale had anyone known of the bankruptcy proceedings, he might never do. According to Marshall, C. J., "a right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use." *Jennings* v. *Carson*, 4 Cranch, 2, 26. The recognition of a power springing from necessity is of old standing in English law. *Eyston* v. *Studd*, Plowd. 459, 466. 2 Inst. 168; *Baker* v. *Baker*, 1 Ventris, 313. See further *Young* v. *Kellar*, 94 Missouri, 581. *Betterton* v. *Eppstein*, 78 Texas, 443. *In re Le Vay*, 125 Fed. Rep. 990, 992.

It is argued that if a sale was necessary the court of bankruptcy could have directed it under General Order XVIII, 3, and that its power was exclusive. But such a rule would much impair the usefulness of the principle. The trustee if appointed may not know the condition of the property or be prepared to decide. The court having the actual custody of the *res* does not know of the bankruptcy proceedings. There is a necessity for immediate action and no one is ready to act. If the local court in its ignorance directs a sale and the purchaser is chargeable with notice that there may be somewhere a petition filed that will destroy his title, the doubt affects the price that he will give, and if the sale turns out effective the goods have been sacrificed. The very reason of the rule that permits a good title to be given by an authority that has

none contradicts the limitation supposed. We are of opinion that the power of the territorial court remained. "For necessity (which is excepted out of the law) the sale in that case is good." 2 Inst. 168. The proceeding is *in rem*, against all the world, the sale stands, and the claim of the trustee is transferred to the proceeds, which ordinarily must be presumed to represent the fair value of the goods and take their place.

Finally it is argued that the court of bankruptcy must decide whether the property is perishable or not, and that this property was not within the power conferred by the statute of New Mexico. The first proposition is little more than the one last discussed in another form. But assuming that for any reason we could go behind the findings on which the case comes here we see no reason for doing so, if the sale was within the terms of the local act. On that question, as usual, we follow the ruling of the Supreme Court of the Territory unless there are stronger reasons to the contrary than are shown here. *Fox* v. *Haarstick*, 156 U. S. 674. *Albright* v. *Sandoval*, 216 U. S. 331, 339. The act as construed, though possibly broader than General Order XVIII, 3, does not go beyond the principle of necessity, at least as applied to this case.

Judgment affirmed.